

THE MODERN LAW OF MORTGAGES IN TANZANIA

THE ROLE OF THE LAND ACT, 1999

by

GEORGE NATHAN MWAISONDOLA

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ABSTRACT

The thesis examines the law of mortgages in Tanzania following the enactment of new land laws, in particular the Land Act 1999. In the study, we examine the statutory regime introduced by the Land Act focusing on, among others, what the Act sought to address, its weakness and achievement.

The study can basically be divided into two main parts. We discuss form of mortgages in part one and enforcement of mortgages in part two. But we have nine chapters in the text. Chapter one states the objectives of this work and highlights the research methodology. We stressed in chapter one that this work is basically a theoretical analysis of the law. In chapter two, we discuss the sources of land law and the choice of law in regulating property transactions.

In chapter three, the concept of security in land is examined. Also a general overview of land tenure and estate is considered in this chapter. In addition, an explanation of the transferable interests in land both under customary law and granted right of occupancy is considered. Chapter four provides an analysis of the form of mortgages which were capable of being created before the enactment of the Land Act, 1999 and in chapter five, we discuss form of mortgages capable of being created under the Land Act, 1999. In this chapter, we have also highlighted matters related with the mortgage.

Chapter six provides an investigation of the rights of the parties under a mortgage. In chapters seven and eight we discuss the enforcement of mortgages. We conclude in chapter nine.

“Focus, hard work and perseverance”

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LIST OF ABBREVIATIONS

C & B	Burn, E. H. <i>Cheshire and Burn's Modern Law of Real Property</i>
CAT	Court of Appeal of Tanzania
DULJ	University of Dar es salaam Law Journal
EA	Court of Appeal for East Africa
EACA	Court of Appeal for Eastern Africa
EALJ	East African Law Journal
EALR	East African Law Review
F & L	Tyler, E. L. G. <i>Fisher and Lightwoods Law of Mortgage</i>
G & G	Gray, K. & Gray, S. F. <i>Elements of Land Law</i>
G & S	Gray, K. J. & Symes, P. D. <i>Real Property and Real People: Principles of Land Law</i>
ICLQ	International and Comparative Law Quarterly
JAL	Journal of African Law
JALO	Judicature and Applications of Law Ordinance
J & F	James, R. W. & Fimbo, G. M. <i>Customary Land Law of Tanzania</i>
M & B	Burn, E. H., <i>Maudsley & Burn's Land Law: Cases and Materials</i>
MLR	Modern Law Review
M & W	Megarry, R. & Wade, W. <i>The Law of Real Property</i>
LCO	Law of Contract Ordinance

CHAPTER ONE

INTRODUCTION

1.1 Research question to be addressed

This study examines the law related to the use of land as security in Tanzania. In particular, we will examine the law of mortgages of land following the enactment of the new land laws, especially the Land Act, 1999. In this thesis we will offer a critique of the statutory regime introduced by the Land Act, 1999 focusing on, among others, what the act sought to address, its effectiveness and achievement.

The need to examine the use of landed security in a country like Tanzania cannot be over emphasised. Land issues can be sensitive. Of an estimated 36 million people living in roughly 945,000 sq. km¹, almost 81 percent² of the labour force is rural based depending on land in one way or the other for daily subsistence. Agriculture is the main stream of the economy. Agriculture is dominated by smallholder farmers cultivating average farm sizes of between 0.9 hectares and 3.0 hectares each but accounts for about half of the national income, employs about 80 percent of the population, and earns Tanzania three-quarters of her total foreign exchange.³ Pastoralism also is a common phenomenon. Pastoralists require a big expanse of land to provide animal pastures. This is because their pattern of land utilisation involves cyclical seasonal movements with herds of livestock

¹ In 2002 the population was estimated at 33 millions people. See <http://www.tanzania.gov.tz> accessed in March 2003.

² See <http://www.tzonline.org/pdf/Tanzaniahumandevelopmentreport.pdf> accessed in March 2003.

³ See www.tanzania.go.tz/agriculture accessed in March 2003.

looking for pastures. The different modes of land utilization between the pastoralists and the agricultural communities sometimes results in land conflicts.⁴ Land for these communities is a main source of livelihood and sometimes holds a sentimental value to the community involved. Of the pastoral society in Tanzania, the Maasai is the largest and most widely known. Traditionally the Maasai occupy the Maasailand located in the North Eastern part of Tanzania stretching to Kenya. The Maasailand proper is rather a dry area and is overstretched.⁵ Yet, Maasailand is also pressurised by the rich concentration of wild animal populations associated with a number of national parks and game reserves.⁶ This intensive reliance on land for the existence of a large percentage of the population makes land issues very important.

Mining, a booming economic sector, also needs land for the obvious reason that minerals are found in the ground. A business needs land as well for building, factories, stores, warehouses etc.⁷ Even professional practices such as law, medicine and general merchandise need land for offices, clinics, chambers, shops etc.⁸

⁴ The Maasai have an infamous myth that all land is a Maasai land, and hence they are entitled to graze wherever they go. The land issue is sensitive.

⁵ The Maasai is probably the largest pastoral society in East Africa. The average rainfall in Maasailand range between 500-750 millimetres per annum. This condition does not favour extensive agricultural production. See Parkipuny M. L. "Some Crucial Aspects of the Maasai Predicament" pp. 136-157 in Coulson, A. (Ed.). *African Socialism in Practice. Tanzanian Experience*. Nottingham: Spokesman, 1979. p. 136.

⁶ The Serengeti, Manyara, Tarangire, Arusha and Kilimanjaro National Parks and the famous Ngorongoro Conservation Area, all extend over traditional Maasai grazing land, see Arhem, K. "Pastoralism under Pressure: The Ngorongoro Maasai" (pp. 239-254) in Boesen, J. and Havnevik, K. J. *et al.* (Eds.). *Tanzania Crisis and the Struggle for Survival*. Uppsala: Scandinavian Institute of African Studies, 1986. p. 243. It is estimated that almost 23% of the land surface in Tanzania is allocated to reserves being National Parks, Game Reserves and Forest Reserves. This is the largest share of land resources allocated to reserves by any country in Sub-Saharan Africa. See <http://www.tanzania.go.tz>.

⁷ Essien, E. *Law of Credit and Security in Nigeria*. Uyo: Golden Educational Publisher, 2000. p. 1.

⁸ Essien, p. 1.

Apart from the many uses of land mentioned above, there is a new demand for land that is the need of land as security for loans advanced by banks or financial institutions.⁹ Although practices of using land as security were not uncommon in Tanzania at an earlier period, the focus in this work will be on the effect of the socio-political and economic changes experienced since the mid 1980s on the legal framework. The changes which will be discussed below have had an impact on the attitude of the peoples towards borrowing, have opened up the market to new actors both lenders and borrowers and ultimately resulted in the demand for reform.

Essien in the book *Law of Credit and Security in Nigeria*¹⁰ gave a description of the problems of the use of land as security in Nigeria as ranging from legislative to judicial¹¹ and from social to political.¹² His description suits the Tanzanian situation well as land administration faces many problems. On legislation, there is a feeling in the society that the laws which are in place do not facilitate borrowing and lending, since either they do not provide enough or lean too much on one side or simply they are not good enough.¹³ Regarding the judiciary, the courts have to play a central role in interpreting the law,

⁹ Bank means an entity that is engaged in the banking business that the business of receiving funds from the general public through the acceptance of deposits and use such funds for loans or investment; a financial institution means an entity engaged in the business of banking, but limited as to size, locations served, or permitted activities as prescribed by the Bank of Tanzania or required by the terms of its licence. See s. 3 of the Banking and Financial Institutions Act, 2006, Act No. 5 of 2006. Act No. 5 of 2006 repealed Banking and Financial Institutions Act, 1991, Act No. 12 of 1991, amended by Act No. 10 of 1993, Act No. 10 of 1994 and Act No. 18 of 1995.

¹⁰ See p. 2.

¹¹ The need to balance the freedom to deal with the land in the market and the protection of the user and occupier of the land. In this English cases such as *Barclays Bank P/c v O'Brien* [1993] 4 All ER 417; *Lloyds Bank P/c v Rosset* [1992] 2 WLR 867; *Mtumwa Rashid v Abdallah Iddi and Salum Omary*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 22 of 1993 (Unreported)

¹² The power of the state to revoke for public interest the right of an individual to occupy and use the land. See *Manyara Estates Ltd and Others v National Development Credit Agency* (1970) EA 177.

¹³ The burden placed on the lenders and the borrowers by the Land Act, 1999 and other laws will be discussed.

resolving disputes and balancing conflicting interests among the players in the land market. However, lack of facilities and resources, delays in adjudication of cases, corruption and incompetent judicial officers seriously undermine the integrity of the courts.

There is also a social problem related to the use of land as security in Tanzania. Many potential borrowers own properties in unserviced areas making them unattractive to lenders. Enforcing repayment by falling on these properties may be fruitless. These problems increase the lending risks, and hence high interest rates sometimes up to twenty percent are charged by lenders which make loan repayment difficult.¹⁴ There is a Swahili saying which sums up the feelings – *kukopa harusi kulipa matanga*, meaning borrowing is associated with happiness but payment with grief.¹⁵

Essien goes on to point to another source of a problem, that is, a commercial source created by businessmen themselves who may stop at nothing in the bid to make a profit.¹⁶ In the quest for profit, they sometimes enter into transactions not sanctioned by the law. He argues that the situation is such that anyone who takes landed security in Nigeria may

¹⁴ See a paper by Kibodya, F.G titled the *Taking and Enforcement of Collateral – Financial Sector Review* presented on 29 May 2006 at World Bank Conference on Commercial Disputes and Enforcing Contracts: Improving the Legal Framework for Doing Business in Tanzania. Mr Kibodya whom I had a discussion during a field research is among others, an Advocate of the High Court of Tanzania, a Legal Counsel with National Bank of Commerce, Chairman of Tanzania Bankers Association (TBA) Team of Legal Experts and Chairman of TBA Management Committee of the Credit Information Bureau.

¹⁵ *Kukopa harusi kulipa matanga* can be translated literally - kukopa – to borrow, harusi – wedding, kulipa – to pay, matanga – mourning.

¹⁶ Essien, p. 2.

as well be taking a law suit.¹⁷ At this stage, it is important to discuss the historical background to the problem of the use of land as security.

1.2 Background to the problem

Many countries in Africa and other parts of the third world have seen different social and/or political policies which have had an impact on economic policies. In many respects, the socio-political and economic policies of these countries have reflected the global policies of the time. Social and political policies are reflected in the law governing peoples' lives, the economy and the means and nature of business transactions.

With the end of the cold war in the 1980s the political policies of most of the socialist and communist countries changed substantially. This had an impact on their economic policies as well. There emerged a common chorus - market economy. It was a phenomenon, and still is that the dominant policy required that the market should decide the rules in business. It was aimed at creating a global economy, that is, a world without borders, by disregarding national boundaries and ending state control in the economy. In the process, previously inaccessible markets and resources in the developing nations would become accessible to goods and services from developed nations. Therefore, liberalization of the economy and privatisation of the public sector to conform to the need to globalise become the rallying point for the Western capitalist states using the world monetary institutions the IMF and World Bank. Third world countries had to adjust accordingly to conform to the new world order.

¹⁷ Essien, p. 2.

1.2.1 The changes in political and economic policies and their impact on the banking business

After independence in 1961, Tanzania was not different from other independent African countries.¹⁸ The economy depended on a few foreign-owned plantations and estates producing about half of the country's export earning, and on more than two million peasant families producing most of their own food and selling cash crops such as cotton, coffee, cashew nuts, and pyrethrum.¹⁹ There were foreign companies given tax concessions to invest in import-substituting industries, foreign banks etc.²⁰ In seeking to address the problems created by economic relations imposed upon it by the colonial power and imperialism (*ubeberu*)²¹, the government had to choose a correct way. Capitalism was seen as incapable of bringing equitable development to the people. Capitalism was seen as a threat to the nation's welfare. In a paper called "Rational Choice", the then President Nyerere explained why capitalism would not work in the third world countries. He said:

“... Third world capitalism would have no choice except to cooperate with external capitalism, as a very junior partner. Otherwise it would be strangled at birth. You cannot develop capitalism in our countries without foreign Capitalists, with their money and their management expertise. And these foreign Capitalists will invest in Third World countries only if, when, and to the extent that they are

¹⁸ Tanzania is formed by the union between Tanganyika (Tanzania mainland) and the Island of Zanzibar in April 1964. In this work, the expression Tanzania in most case refers to the former Tanganyika (Tanzania mainland) and vice-versa unless stated to the contrary.

¹⁹ Coulson, A. (Ed.). *African Socialism in Practice. Tanzanian Experience*. p. 1.

²⁰ Coulson, p. 1.

²¹ *Beberu* (noun) is Swahili for a he-goat, while *ubeberu* is the behaviour of a he goat.

convinced that to do so would be more profitable to them than any other investment. Development through capitalism means that the Third World nations have to meet conditions laid down by others - by the capitalists of other countries. And if we agreed to their conditions we should have to continue to be guided by them or face the threat of new enterprises being run down, of money and skills being withdrawn, and of other economic sanctions being applied against us".²²

The government chose the socialism path. The form of the Tanzanian socialism commonly referred to as *Ujamaa* was inspired by the spirit of equality, good neighbourhood and good citizenship. It was probably a reasonable choice at the time. The Arusha Declaration of 1967 was declared to commit the country to Socialism and Self-reliance. The declaration was not to effect the isolation of the country from the developed centre, but to instil among the people a conscious awareness of the danger of depending on donors for development.²³ The term self-reliance was interpreted as the freedom to implement development projects without depending on aid from abroad, while one meaning attributed to socialism²⁴ (*Ujamaa*) was a sense of national control of the commanding heights of the economy.²⁵ The Arusha Declaration was followed by the nationalisation of the private companies and banks, insurance companies, plantations and estates. The state controlled all the economic sectors.

²² A speech delivered on behalf of President Nyerere in Khartoum 1973 in Coulson, p. 22.

²³ This awareness is referred to by Samir Amin as a process of delinking. Amin, S. *Delinking*. London: Zed Books, 1985. pp. 62-67.

²⁴ The term socialism was also used in a negative way to mean the absence of features such as exploitation, corruption and class divisions in the society. Amin, p. 2.

²⁵ Amin, p. 2.

It is this background that influenced the state of affairs and the law in the country. The major means of production, such as factories and mines came to be state owned. A State economic sector was created in a form of parastatals – companies owned by the state or where the state had shares.²⁶ Private commercial banks were replaced with state owned banks. Political policies at the time influenced the way banks and other financial institutions conducted business. Monopolies were given to the few state owned commercial banks as well as to the few companies and parastatal organizations.²⁷ The first bank to be established after the nationalisation was the National Bank of Commerce (NBC).²⁸ It was established in 1967 and was charged with the task of providing general banking business in the country. It was the main bank with no specialisation. However, the vacuum was noticed and in the 1970s the government established financial institutions (banks) to provide for specific services such as investment and housing finance. Some of the commercial banks and financial institutions in the country were the following:

- National Bank of Commerce (NBC);²⁹
- Cooperative and Rural Development Bank (CRDB);³⁰

²⁶ In some situation, instead of total nationalisation, the state simply went into the partnership with international capital in which the former owner could retain some shares and provided a management services.

²⁷ Examples of companies are National Milling Corporation (NMC), Tanzania Timbers (TANTIMBER), Domestic Appliances and Bicycle Corporation (DABCO).

²⁸ See the National Bank of Commerce (Establishment and Vesting of Assets and Liabilities) Act, 1967, Act No. 1 of 1967.

²⁹ NBC was born out of the nationalisation of banks and financial institutions in Tanzania in 1967 (after Arusha Declaration). In 1997 a step was taken towards the privatisation of NBC. A decision was taken to split NBC into three entities, namely NBC Holding Corporation, National Micro-finance Bank, (NMB) and NBC (1997) limited, see National Bank of Commerce (Reorganization and Vesting of Assets and Liabilities) Act, 1997, Act No. 23 of 1997. NBC Limited as known today was formed on 1st April 2000 when NBC (1997) was privatised and sold to ABSA Group Ltd of South Africa, see NBC (1997) Limited Incorporation Act, 1997, Act No. 21 of 1997 and subsequent Act that is NBC (1997) Limited Incorporation Repeal Act, 1999, Act No. 16 of 1999.

- Tanzania Postal Bank;³¹
- Tanzania Housing Bank (THB);³²
- Tanzania Investment Bank;³³
- The Peoples' Bank of Zanzibar

These banks and financial institutions were operating in the environment where the laws in place were designed to cater for a socialist society.³⁴ The law and practices reflected the local situation of the time, that is, business was conducted in a socialist economy with strong state control. There were no complex business transactions, as there were no big companies or multinational corporations with branches all over the world as is the case today.

As for banking, the law set out powers and limitations on the conduct of the business of banking including in the area of “borrowing and lending”. The business of banking was not market oriented, but shaped by state policies in a state controlled economy. Banks lacked competitiveness because of the monopoly nature of their business. They were not profit oriented because of regulations which reduced their freedom. Furthermore, they

³⁰ CRDB (CRDB Bank limited) is now a private commercial bank. It was established on 1st July 1996 to succeed the former Cooperative and Rural Development Bank which was a public institution with the majority of shares owned by the government.

³¹ Tanzania Postal Bank was established to mobilize local savings and to promote the savings habit of the population. See Tanzania Postal Bank Act, 1991, Act No. 11 of 1991.

³² Before it collapsed in 1993, THB issued housing loans to individuals and building societies.

³³ It was established in 1970 by the Tanzania Investment Bank Act, 1970, Act No. 20 of 1970. It grants medium and long-term loans to economically sound and technically feasible projects in the key industrial and agricultural sectors of the economy. It also provides technical assistance and advice to investors.

³⁴ In principle, Tanzania is still a socialist country although in practice it is not. Art. 3 (1) of the Constitution states, “the United Republic is a democratic and socialist state which adheres to multi-party democracy. See also art. 9 (k) which states that the objective policy behind the constitution is to make sure that the country is governed according to the principles of democracy and socialism.

relied on state funds to run their businesses. The environment created by these policies was not conducive to vibrant economic development. The economy stalled, business suffered and some banks such as the Tanzania Housing Bank collapsed.³⁵

The economic crisis of the late 1970s led the government into discussion with monetary institutions. The monetary institutions maintained that Tanzania must change its economic policies by reducing the role of the state in the economy in order to give room for market forces to operate freely.³⁶

1.2.2 Liberalisation and the deregulation of the banking sector: The change in borrowing and lending transactions

In the mid 1980s and early 1990s, Tanzania reluctantly started to liberalise its economy. This came after the country succumbed to pressure from the international monetary institutions, the World Bank and the IMF for the implementation of Structural Adjustment Programmes (SAPs). Initially, liberalisation was in the form of a restructuring of the economic sector including the abolition of state subsidies in various economic areas, reduction of the number of commodities in the control price list and devaluation of the Tanzania shilling.³⁷ Further liberalisation was trade liberalisation. Parastatal organizations were also reformed either by liquidating them or selling them to private persons.

³⁵ The Tanzania Housing Bank collapsed in 1993 partly because it could not recover the loans advanced.

³⁶ Campbell, H. & Stein, H. (Eds.). *Tanzania and the IMF: The Dynamics of Liberalisation*. Boulder: Westview Press. 1992. p. 22.

³⁷ Campbell, p. 25.

One area of the country's economy that was rather protected despite the implementation of the SAP was the financial sector which included banking. Its reformation was slow and deliberate. In 1990, the government passed the National Investment Promotion Policy,³⁸ with the objective of enhancing economic and social development by identifying investment areas to encourage local and foreign investors. The policy under s. 11.2.8 specified that investment in banking due to its "strategic importance" would be a reserved area requiring a special licence before a person was permitted to invest in that area. Then the National Investment (Promotion and Protection) Act, 1990³⁹ was enacted giving the policy statement legal force.⁴⁰

With the liberalization of the economy the financial services sector was opened to private and foreign capital, and hence the market started dictating the terms of business rather than state law and policies. The State-owned banks were reconstituted to improve their efficiency and enhance the stability of the financial system. Several foreign and local private banks and non-bank financial institutions were licensed to do business in Tanzania. The country saw the emergence of *foreign banks and homegrown* commercial private banks and financial institutions. All of these, with the newly incorporated corporations saw the emergence of new practices in banking business. Examples of commercial banks and financial institutions incorporated in the country are:⁴¹

- Akiba Commercial Bank Ltd;

³⁸ Produced by the President Office-Planning Commission, Dar es Salaam, Feb 1990.

³⁹ Act No. 10 of 1990.

⁴⁰ s. 19 (1) (b) states the enterprises in the areas listed in Part B of the Schedule shall be reserved for the public sector except where the Minister may grant a special licence for investment in this area. Part B (2) mentions areas such as manufacturing, marketing and distribution of armaments and explosives of all types, generation of electricity, insurance and assurance services, banks etc.

⁴¹ <http://www.cats-net.com/tic/banks.htm> accessed in April 2003.

- Kenya Commercial Bank Ltd;
- International Bank of Malaysia;
- Habib African Bank Ltd;
- United Bank of Africa;
- CF Union Bank Ltd;
- African Banking Corporation (T) Ltd;
- Savings and Finance Bank Ltd;
- Azania Bancorp;
- Bank of Baroda (T) Ltd;
- Standard Chartered Bank (T) Ltd;
- Barclays Bank (T) Ltd;
- Stanbic Bank (T);
- Citibank (T) Ltd;
- Exim Bank (T) Ltd;
- Federal Bank of the Middle East (T) Ltd;
- Eurafrican Bank (T) Ltd;
- Diamond Trust Bank (T) Ltd.

The list of banks and financial institutions provided above is in addition to banks and institutions which existed before deregulation of the banking sectors. Most of them have been privatised or restructured to reflect the current demand in the market. They include banks such as NBC Limited, National Microfinance Bank Ltd, CRDB Bank Ltd, The Peoples' Bank of Zanzibar Ltd, Tanzania Postal Bank and Tanzania Investment Bank.

Also, there are community and/or regional banks and financial institutions such as Kilimanjaro Co-operative Bank Ltd, Dar es salaam Community Bank, Mwanga Community Bank, Mufindi Community Bank, Kagera Farmers Co-operative Bank and Mbinga Community Bank.⁴²

However, the changes, particularly the introduction of new actors in the borrowing - lending business that had been exclusively reserved for a few institutions,⁴³ had unforeseen consequences for banking businesses in general. The actors have stretched the practices to the extent of outgrowing the legal set up necessary for their very existence.

Reforms of the land law in the sense of restructuring of the rules and procedures in an attempt to make the land system consistent with the requirement of economic, political, and social development was inevitable. This resulted in the enactment of, among others the Land Act, 1999 as amended by the Land (Amendment) Act, 2004 and the Village Land Act, 1999. This work will therefore examine the impact of the new laws in regulating mortgages transactions in the country.

⁴² <http://www.bot-tz.org/BankingSupervision/nonbanks.htm> accessed in April 2003.

⁴³ Prior to 1997, the National Bank of Commerce (NBC) used to account for over 75 percent of the country's banking transactions. See <http://www.tradeport.org/ts/countries/tanzania/financing.html> accessed in May 2003.

1.3 Methodology

As pointed earlier, this thesis examines the law of mortgages of land, and in particular the impact of the Land Act 1999 on mortgages of land. To achieve that end, the work is divided into two main parts. The first part which is covered by the first five chapters contains preliminary information and clarification of important concepts. The core in part one involves an investigation of the forms of mortgages capable of being created in the country before and after the land reforms. The second part will cover the enforcement aspects of mortgages and matter related thereto. This is to be found in chapters six, seven and eight.

This work is solely theoretical analysis of the law of mortgages in Tanzania and its conclusion is based on that. As a result we conducted in-depth study of the relevant laws - Acts of parliament, customary law and common law. We consulted text books and other writings on the subject both hard soft copies.⁴⁴ In the context of search in text, it will be observed in the bibliography that there are very few Tanzanian books on land law and non on the law of mortgages. Not much has been written on the law of mortgages in Tanzania. But we consulted such papers, articles, reports and theses as we could find on the state of lending and mortgages in Tanzania. We also consulted cases both Tanzanian and English.

⁴⁴ Authoritative works of Tyler, E. L. G. *Fisher and Lightwoods Law of Mortgage*. 10th ed.; Megarry, R. and Wade, W. *The Law of Real Property*. 6th ed.; and James, R.W. and Fimbo, G. M. *Customary Land Law of Tanzania, A Source Book* for customary mortgages, were relied on for guidance.

We also conducted a field research in Tanzania. We thought the field research would help test the hypotheses on the ground. We were also convinced that a field research not only would enhance the researcher's understanding of the state of lending in Tanzania but would unearth some issues which otherwise would not have been covered by the study. So we conducted a field research in Tanzania.⁴⁵

In the field research we targeted academics, borrowers and lenders (bankers), professional advisors (legal practitioners), NGOs and Legal Clinics, Government Institutions such as the Land Registry, Ministry of Lands, Law Reform Commission, Tanzania Investment Centre and the Judiciary, among others.

In the field research we consulted academics and resources at the main academic institutions in the country notably the University of Dar es Salaam. We were concerned in obtaining literature and advice and sharing general experience on the subject. There was also a plan to visit an Institute of Finance Management (IFM) for the possible view of financial and business aspects of mortgage. We were unsuccessful in this later plan.

Then we talked to borrowers and consulted lenders to try to share their experiences in the state of lending and the law on lending and how it impacts on their businesses. This was an important stage in the field research. We adopted a random selection of bankers. After obtaining the list of banks and financial institutions operating in Tanzania from the Bank of Tanzania (Central Bank), we chose a few which had subsisted from the time of nationalization to the present, and some which existed before nationalization but stopped

⁴⁵ I conducted a field research between March and April 2005.

doing business during Ujamaa period. We also visited newly incorporated banks that is, banks both foreign and home grown which started to operate in the country after the deregulation of the financial sector.

We also managed to talk to legal practitioners (professional advisors). As people who provide professional advice to lenders and borrowers alike and are called upon in case of conflicts, we wanted to share their practical experiences of the market. We sought their views on the practicability of the whole process of creating and enforcing mortgages. We also visited NGOs dealing with land reforms. We also visited government institutions in place to facilitate lending and borrowing such as the Land Registry. We also visited the Tanzania Investment Centre. The Centre is responsible for granting land to foreigners for investment purposes. So we wanted to find out their position if any on occasions a holder of land through the Centre has defaulted.

And finally we visited the Judiciary especially the High Court (Commercial Division). In connection to the above, we managed to meet a member of the Village Land Council - an adjudication institution in the primary level. The mode of the research was mainly by the way of an interview. In rare occasions we asked people to fill in the questionnaire.⁴⁶ However, contrary to our plan, we failed to visit the Tanzania Reform Commission, the Commissioner for Lands in the Ministry of Lands and Human Settlements, and to meet some prominent academics whose views we believe would have been useful. All in all we are convinced that the overall objectives of the research were achieved. The outcomes

⁴⁶ See Appendix A.

of field research are used for illustrative purposes through out this work but not the basis for conclusion.

CHAPTER TWO

SOURCES AND CHOICE OF LAW

2.1 Sources of Tanzania land law

The sources of Tanzania land law are in general the same as the sources of Tanzania law. They vary from the written law (statutes) to English law, customary law and Islamic law. The laws rank in hierarchy according to their importance and apply either separately or in conjunction with other bodies of law depending on different circumstances. But all bodies of laws have a role to play in land administration in the country.

The discussion of the sources of land law and the choice of law is relevant because of the fact that there is more than one body of law in the country (legal pluralism). This fact sometimes poses a challenge as to what law or laws to apply in a particular instance. This is common because some forms of mortgages, for instance customary mortgages, are regulated by one particular body of law and not another. In connection to that, the understanding of the sources of land law will help us appreciate the impact of foreign laws on our *corpus juris* and hence unavoidable reference to, among others, foreign cases and land law texts.

2.1.1 The Constitution

The presence of a supreme constitution exposes some of the important facts related to the source of law in the country and its application. The constitution is the supreme law of the land with which all laws must be consistent. It empowers the government to govern while at the same time, it places control mechanism to prevent the power being used oppressively.¹

The Constitution of the United Republic of Tanzania 1977 as amended from time to time, limits the power of the government in two ways. Firstly, it imposes structural and procedural limitations on power in that the constitution stipulates which institutions or organ of the state may exercise what powers, and sets specific procedural limitations to be followed while exercising the power.² The Tanzanian Constitution stipulates which organ of state is vested with what power.³ Secondly, a constitution, principally through the operation of a Bill of Rights, provides and imposes substantive limitations of the power and the rights of the state and its subjects.⁴

¹ The idea of constitutionalism is that government should derive its power from the constitution and that its power should be limited to those set out in the constitution. See De Waal, J. & Currie, I. *et al. The Bill of Rights Handbook*. 4th ed. Cape Town: Juta, 2000. p. 7.

² De Waal, p. 7.

³ Art. 4 of the constitution provide for the separation of power between the Executive, Parliament and Judicial arms of government. See art. 34 for executive power; art. 64 for legislative power; and arts. 108 and 117 for judicial powers.

⁴ De Waal, p. 7.

Therefore, the Constitution ultimately determines the validity of other laws. The recently promulgated Land Act, 1999⁵ under section 180 (1) begins with the words “subject to the provisions of the Constitution and this Act”, clearly admitting the governance of the constitution in interpreting and applying other laws. However, the constitution by itself is indeed a source of law. As we have seen, the constitution imposes limitations on the exercise of power by the executive in all spheres of people’s lives including land ownership. The constitution provides some rights, which can be relied on solely by landholders to protect their property rights. For instance article 12 (1) declares that “all human beings are born free and are all equal”. This provision is used to invalidate Acts of parliament and/or customary laws which subjugate or discriminate against persons on the basis of nationality, tribe, place of origin, colour, religion, or station in life. The list is inexhaustive.

Another instance prohibited is discrimination on the basis of sex, which means that the common practice especially under customary law of discrimination against women is prohibited. The constitution affords general protection to people regarded as weak or inferior in the society who are subjected to restriction or conditions not necessarily imposed on others.⁶ Article 13 states:

(1) All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.

⁵ Act No. 4 of 1999. It came into force on 1st May 2001, see GN No. 485 of 22/12/2000. The Land Act, 1999 will be discussed in detail in Chapter Five, part 5.2 below.

⁶ See art. 13 (5).

(2) No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect.

(4) No person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office.⁷

Furthermore article 24 provides for the right to own property. It provides:

(1) Subject to the provisions of the relevant laws of the land, every person is entitled to own property, and has the right to the protection of his property held in accordance with the law.

(2) Subject to the provisions of sub article (1) it shall be unlawful for any person to be deprived of property for the purposes on [of] nationalisation or any other purposes without the authority of law which makes provision for fair and adequate compensation.

The protections afforded to natural persons under the Bill of Rights are easy to ascertain. The immediate question is whether the rights and duties extend to artificial persons as well. Although the word person for the purpose of the constitution has not been judicially defined as to whether it refers to only natural persons (individuals) or to both individuals and artificial persons,⁸ the nature of some of the rights and duties is such that they can be

⁷ In *Ephraim v Pastory and another* High Court of Tanzania at Mwanza (PC) Civil Appeal No. 70 of 1989 (unreported), among others, art. 13 (4) of the Constitution was referred to.

⁸ The word person is defined in s. 3 (1) of the Interpretation of Laws and General Clauses Act, 1972, Act No. 30 of 1972 to “includes any body of persons whether corporate or unincorporate”. So far I am not

enforced albeit in a restricted way by both individuals and companies.⁹ For instance the right to equality before the law under article 13 (1) and sub article (2), the right to freedom of association under article 20 (1), the right to just remuneration under article 23, the right to own property under article 24, the duty to observe and abide by the Constitution and the laws under article 26, and the duty to protect natural resources and public property under article 27, concerns companies as well.¹⁰ In practice companies have been relying on the Bill of Rights to pursue their rights against the government and its organs. Similarly, it is vital that in fit cases individuals and companies in their private relationships be able to invoke the Bill of Rights.

2.1.2 Written laws

Written law is probably the main source of land law in Tanzania. The expression “written law” as opposed to the common usage “statute” or “Act of parliament” is used in statute law to accommodate enactments which are not statutes. The term written law is defined in section 3 (1) of the Interpretation of Laws and General Clauses Act, 1972¹¹ to mean “all Acts and Acts of the Community (including subsidiary legislation) and includes all applied laws”.

aware of any judicial definition of the word person for the purpose (as used in) the constitution. However, in law the common usage of the word person includes both natural and artificial persons.

⁹ A company cannot claim protection of the right to life under art. 14 nor the right to personal freedom under art. 15 as these rights are associated with human beings. See De Waal, pp. 39-42. There is a reference under article 12 of the expresssion “human beings” and “person” in sub articles (1) and (2) respectively.

¹⁰ See also art. 29.

¹¹ Act No. 30 of 1972. Act No. 30 was repealed by Interpretation of Laws Act, 1996, Act No. 4 of 1996. The Interpretation of Laws Act is not yet in force.

The application of written law as a source of law was first provided for in the Judicature and Application of Laws Ordinance (JALO),¹² which stated that the jurisdiction of the High Court shall be guided by the written laws which were in force in Tanganyika on 9th December 1961.¹³ The Land Act, 1999 also mentions the application of written laws in land disputes.

Prior to 1999, land matters were largely regulated by the Land Ordinance (Cap. 113) and the Land (Law of Property and Conveyancing) Ordinance (Cap. 114) both enacted in 1923. Importantly, Cap 113 created a general framework of land tenure in Tanzania,¹⁴ while Cap 114 largely provided for the application of the English law of property and conveyancing in Tanganyika. Specifically, Cap 114 provided for the application in the country of the English law of real and personal property, mortgagor and mortgagee, landlord and tenant, and trusts and trustees in force in England on the first day of January, 1922.¹⁵ However, such English law and practice were applicable only if they suited the circumstances in the country.¹⁶

The Land Act, 1999 repealed the two ordinances.¹⁷ It has assumed main responsibility for land administration. It is important to note that in addition to land statutes which were not repealed such as the Land Registration Ordinance (Cap 334), Registration of Documents

¹² Cap 453, it is an Ordinance to declare the Jurisdiction of the High Court and Subordinates Courts, and to apply and recognise certain laws.

¹³ s. 2 (2).

¹⁴ See Chapter three, part 3.2 for the overview of land tenure.

¹⁵ s. 2 (1) of Cap. 114. The date 1st of January 1922 specifically extended the reception date for the English law and practice from the general reception date of 22nd of July 1920 for the application of the English common law, the doctrines of equity and statutes of general application as provided in the Tanganyika Order in Council of 1920. See part 2.1.4 below.

¹⁶ s. 2 (2) of Cap. 114.

¹⁷ s. 182 and schedule to the Land Act.

Ordinance (Cap. 117), and Land Acquisition Act, 1967,¹⁸ the Land Act enacts that if any provision of any other written law applicable to land conflicts with or is inconsistent with any provisions of the Land Act, that provision shall cease to apply to the extent of that conflict or inconsistency.¹⁹ The Land Act or written law in general is the main source of the land law in the country.

2.1.3 Customary law and Islamic law

Customary law is that body of customs which by usage has acquired the force of law.²⁰ Customary law is defined in section 3 (1) of the Interpretation of Laws and General Clauses Act, 1972 as “any rule or body of rules whereby rights and duties are acquired or imposed, established by usage in any Tanganyika African community and accepted by such community in general as having the force of law, including any declaration or modification of customary law made or deemed to have been made under s. 9A of the Judicature and Application of Laws Ordinance, 1961...”. The definition proceeds stating that “references to ‘native law’ or to ‘native law and custom’ shall be similarly construed”.²¹ Customs are values that regulate the behaviour of people in a given society.

Customary law is generally uncodified and hence it is realisable only by report or account of people who are acquainted with the law because they belong to the customary law

¹⁸ See Schedule of the Land Act for the list of statutes repealed by the Act.

¹⁹ See s. 181.

²⁰ See Spry J. in *Hussein Mbwana v Amiri Chongwe* C.A 1/1963 (T) in J & F p. 180.

²¹ The Land Act does not define customary law but in s. 2 refers to the Interpretation of Laws and General Clauses Act, 1972.

community in question.²² Apart from its application in other spheres of life, such as marriage and succession, customary law governs issues related to land ownership for the majority of Tanzanians. It is believed that customary land tenure regulates transactions and institutions concerning land of more than ninety percent of the people of Tanzania.²³ Indeed one form of land tenure is the deemed or customary right of occupancy which is governed by customary laws. Forms of land tenure are discussed in chapter three, part 3.2 below. In this part, it is enough to state simply a holder of deemed or customary right of occupancy may dispose his interest in the right by the way of mortgage, pledge or sale etc in accordance with the customary law of the community in which the transaction takes place.

The use of customary law as a source of law was first provided for under the Tanganyika Order in Council, 1920.²⁴ Article 24 (1) states that:

(1) In all cases civil or criminal to which natives are parties every Court shall be guided by native law²⁵ so far as it is applicable and is not repugnant to justice and morality or inconsistent with any Order in Council or Ordinance or any Regulation or Rule made under any Order or Ordinance; and shall decide all such

²² In the Ghanaian case of *Angu v Attah* (1916) P.C., 43 quoted in Allott, A. *Essays in African Law*. London: Butterworth, 1960. p. 44, their Lordships of the Privy Council laid down that “As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native custom until the particular customs have, by frequent proof in the court become so notorious that the court will take judicial notice of them”. See also *Kigizi v Lukiko of Buganda* (1943) 6 U. L. R. 113 at 117. For discussion of an attempt to codify customary law see part 2.4 below.

²³ James, R. W. *Land Tenure and Policy in Tanzania*. Nairobi: East African Literature Bureau, 1971. p. 179. Ninety percent is probably an exaggeration based on the current urbanisation trend and a deliberate government move against customary rights of occupancy.

²⁴ Made under the Foreign Jurisdiction Act, 1890.

²⁵ The word native law is not specifically statutorily defined. One has to rely on the definition of customary law in the Interpretation of Laws and General Clauses Act, 1972.

cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

The position was restated in JALO in which section 9 provides that:

“In all cases, civil and criminal to which persons subject to native law and custom are parties, every court shall be guided by native law and custom so far as it is applicable and is not repugnant to justice or morality or inconsistent with any written law....”

These were the leading provisions that allowed the use of customary law in the country.²⁶

In principle, the two provisions directed the High Court to be guided by applicable customary law between people subject to it, and that customary law should not be applicable if it is repugnant to justice and morality.²⁷

However, the Magistrates Courts Act, 1963, repealed section 9 of JALO and replaced it with new sections 9 and 9A.²⁸ The new sections especially section 9 provides for what persons and over what matter customary law was applicable. It also tried to resolve the

²⁶ There is no substantial difference between the two provisions, only that while art. 24 (1) of the Tanganyika Order in Council provided that the court be guided by customary law as far as it is applicable and is not repugnant to “justice and morality”, s. 9 of JALO provided that the court be guided by customary law so far as it is applicable and is not repugnant to “justice or morality”. Section 9 of JALO lowered the threshold.

²⁷ Cotran, E. “Integration of Court and Application of Customary Law in Tanzania”. *East African Law Journal*. 1965, 1, 108-123 at 115.

²⁸ No 55 of 1963. Magistrates’ Courts Act, 1963 was repealed by Magistrates’ Courts Act, 1984, No. 2 of 1984.

conflict that might arise between statutory law and customary law or between different customary laws or between customary law and Islamic law.²⁹

The following points can be deduced from the provisions and the statutory definition of customary law:

- Customary law is the rules established by usage and accepted by the community as having the force of law. It is applicable in civil matters only, but before applying the customary law, courts must establish that the customary law in question exists, is accepted and is practised by those concerned;³⁰
- The application of customary law is no longer subject to its not being repugnant to justice or morality.³¹ However, occasionally courts have subjected customary law to the principles of natural justice and public policy. In *Kazunge Lushinge v Juakali Degulla*,³² Mushi J. observed by the way of obiter that even if a party established the existence of sukuma customary law which legally obliged a parent to settle the debts of his adult independent son, that customary law would be repugnant to natural justice and contrary to public policy;
- The test for the application of customary law no longer depends on a person's race or his tribal roots, but on his membership of a community.³³ A non-African by becoming a member of a customary community may become subject to the

²⁹ Cotran, p. 115.

³⁰ s. 9 (1) (a) and (b) of JALO.

³¹ Cotran, p. 117.

³² [1986] TLR 98 at 102 (HC).

³³ s. 9 (1) (c) of JALO.

customary law of that community.³⁴ Consequently, a member of a customary community who ceases to be a member of a customary community will cease to be subject to that customary law,³⁵

- That in all cases where customary law is applicable, it should not be excluded if it is apparent from the nature of any relevant act or transaction that such act or transaction was designed to avoid, for an unjust purpose, the application of customary law;³⁶
- That the courts should apply the customary law prevailing within the area of its local jurisdiction, and in case of conflict between customary laws, the court should apply the law where the transaction or matter occurred or arose, unless the court is satisfied that the proper customary law applicable is some other law;³⁷
- That the court should not apply any rule or practice of customary law which is abolished, prohibited, punishable, declared unlawful or expressly or impliedly disapplied or superseded by any statute.³⁸ In *Maagwi Kimito v Gibeno Warema*,³⁹ the Court of Appeal observed that “the customary laws of this country, now have the same status in our courts as any law, subject only to the Constitution and any

³⁴ S. 9 (2) (a) of JALO.

³⁵ Cotran, p. 117 See s. 9 (2) (b) of JALO.

³⁶ Cotran, p. 117. See proviso to s. 9 (1) of JALO.

³⁷ Cotran, p. 117. See s. 9 (3) of JALO, also see *Kazunge Lushinge v Juakali Degulla* [1986] TLR 98.

³⁸ See proviso to s. 9 (3) of JALO. Note statutes of general application do not fall under this category, see s. 9 (4) of JALO.

³⁹ Court of Appeal of Tanzania (Mwanza) Civil Appeal No. 20 of 1984 unreported quoted in *Simon Kabaka Daniel v Mwita Marwa Nyang'anyi and 11 Others* [1989] TLR 64 (HC).

statutory law that may provide to the contrary”. This makes customary law subordinate to the Constitution and written laws.

The Land Act, 1999 provide for application of the customary law in land matters. Section 180 (1) (a) provides that the court shall apply the customary laws of Tanzania in implementing and interpreting the Land Act, 1999. But one must go back to JALO for specific clarification of the application of customary law. As for substantive customary laws, neither the Land Act, 1999 nor the Village Land Act, 1999⁴⁰ provide much help on the content of the customary laws. So reports of members of a particular customary community remain a main source of customary law.⁴¹ The only codified sources of customary laws are found mainly in the decisions of the courts in customary law disputes, literature on customary laws and practices,⁴² and in the customary laws declarations orders.⁴³ The court will apply customary law if parties entered into the transaction in accordance with customary law.

Apart from customary law, Islamic law in the broad sense applies in civil matters related to marriage, divorce, guardianship, inheritance, waqf and similar matters in relation to members of a community that follows that law.⁴⁴ However, it is difficult to draw a clear line on the application of Islamic law in land matters, as its application is very restricted

⁴⁰ Act No. 5 of 1999. It was enacted to provide for the management and administration of land in villages and related matter.

⁴¹ See part 2.4 below for the attempt to codify customary laws.

⁴² Text book such as James, R. W. & Fimbo, G. M. *Customary Land Law of Tanzania, A Source Book*. Nairobi: East African Literature Bureau, 1973.

⁴³ See for instance Local Customary Law (Declaration) Order, 1963, GN No. 279 of 1963; and Local Customary Law (Declaration) (No. 4) Order, 1963, GN No. 436 of 1963.

⁴⁴ s. 9 (1) (ii) of JALO. See also *The Secretary of State for Foreign Affairs v Chalresworth, Pilling & CO. and T. D. Chalresworth & CO.* [1901] AC 373.

even among tribes which are largely Muslim.⁴⁵ The Islamic law does not apply directly in land matters. It was stated in *Mtoro Bin Mwamba v The Attorney General*⁴⁶ that the fact that a tribe may have been converted to Islam does not necessarily mean that its customs particularly those relating to land tenure, are thereby changed. This underscores the fact that customary law is considered first as the law governing the life of a Tanzanian Muslim.

Furthermore, Spry J. in *Hussein Mbwana v Amiri Chongwe*⁴⁷ stated that there are two systems of law which may apply in an African Muslim community, religious law in a matter peculiarly personal such as marriage, and customary law which may apply in all spheres of life. Therefore, to attract the application of Islamic law, a Tanzanian Muslim has to show through his way of life he intends Islamic law to govern his affairs.

2.1.4 English law

English law is another source of law in Tanzania. English law means the law of England.⁴⁸ The application of the English law in Tanzania goes back to the Tanganyika Order in Council, 1920. The Order in Council after setting up the High Court of

⁴⁵ So far I am not aware of official records showing the percentage of muslims in Tanzania probably because of the sensitive nature of the issue. One may estimate the Muslim population the majority of whom are along the coast as between 30-40%. Cole J. S. & Denison, W. N. *Tanganyika*, 1964 quoted in James, at p. 4 put the Muslim population at less than 30%.

⁴⁶ [1953] 20 EACA 108 at 117.

⁴⁷ Quoted in *Re the Estate of the Late Suleman Kusundwa* [1965] EA 247 at 251.

⁴⁸ Hood Phillips, O. & Hudson, A. H. *O Hood Phillips First Book of English Law*. 8th ed. London: Sweet & Maxwell, 1988. p. 3.

Tanganyika under article 17 (1),⁴⁹ provided for the applicable laws. Sub article (2) of article 17 enacted that the civil jurisdiction of the court should be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England at the date of this Order.⁵⁰ It further provided that the English law should be applied so far as the circumstances of the territory permitted and subject to such qualification as local circumstances rendered necessary.⁵¹

The expression common law was used to describe that part of English law which is unenacted, especially that contained in the decisions of the courts as opposed to Acts of Parliament and subordinate legislation.⁵² By the doctrines of equity it means the principles of law based on conscience and fairness which before 1875 were administered by the court of chancery.⁵³ The expression statutes of general application refers only to general statutes as opposed to local statutes, which were in force in England at the time when the country received its English law.⁵⁴

⁴⁹ Art. 17 (1) states, “there shall be a Court of Record styled ‘His Majesty’s High Court of Tanganyika’ (in this Order referred to as the High Court). Save as hereinafter expressed the High Court shall have full jurisdiction, civil and criminal, over all persona, and over all matters in the territory”.

⁵⁰ The date is twenty-second day of July 1920. This is the general reception date for the application of English law in the country, but when particular portions of English law are adopted, it may set a specific reception date such as 1 January 1922 for the reception of the English law of real property. See s. 2 (1) of the repealed Land (Law of Property and Conveyancing) Ordinance (Cap. 114).

⁵¹ See the Proviso to art. 17 of the Tanganyika Order in Council 1920.

⁵² Hood Phillips, O. & Hudson, A. H. *O Hood Phillips First Book of English Law*. 8th ed. p. 9. It is that part of the law of England which before the Judicature Acts, 1873-75, was administered by the common law courts, especially the former Courts of Queen’s Bench, Common Pleas, and Exchequer at Westminster, as opposed to equity or that part of the law which was administered by the Courts of Chancery at Lincoln’s Inn. It is sometimes used to contradistinction to statutes law or to denote unwritten law. See Burke, J. *Jowitt Dictionary of English Law*. 2nd ed. Vol I. London: Sweet & Maxwell, 1977. p. 391. See also *Blacks Law Dictionary*. 6th ed. 1990, p. 276.

⁵³ Equity comes from Latin word *aequitas* meaning fairness, so it is a body of law based on fairness. The Judicature Act, 1873, s. 24, replaced by the Judicature Act 1925, s. 36, all branches of the Supreme Court of England are to administer law and equity concurrently. See *Jowitt Dictionary of English Law*. 2nd ed. Vol I. p. 712.

⁵⁴ It is settled law that the statute need not have applied in throughout United Kingdom, but may only apply in England and Wales. See Allott, A. *Essays in African Law*. London: Butterworth, 1960. p. 9.

The JALO re-enacted the application of English law. Section 2 (2) provided that:

(2) Subject to the provisions of this Ordinance, the jurisdiction of the High Court shall be exercised in conformity with the written laws which are in force in Tanganyika on the date on which this Ordinance comes into operation (including the laws applied by this Ordinance) or which may hereafter be applied or enacted, and subject thereto and so far as the same shall not extend or apply shall be exercised in conformity with the substance of common law, the doctrines of equity and the statutes of general application in force in England on the twenty-second day of July, 1920.

The general reception date set in the Tanganyika Order in Council, 1920 and JALO is important. It is a clear-cut date which excluded from application in the country the English law adopted after twenty-second day of July 1920. The concerns as to whether the date refers only to the statutes of general application, or to common law and doctrines of equity is now irrelevant in Tanzania at least for the purpose of land law.⁵⁵ The Land Act qualifies the application of the common law, the doctrines of equity and statutes of general application. It first receives not only the substance of the common law and the doctrines of equity applied in England, but also the substance of common law⁵⁶ and the doctrines of equity as applied from time to time in other countries of the commonwealth which appear to the court to be relevant to the circumstances of Tanzania.⁵⁷ The expression from time to time is wide enough to accommodate the introduction of recent

⁵⁵ Roberts-Wrays, K. *The Commonwealth and Colonial Law*. London: Stevens & Sons, 1966. p. 545.

⁵⁶ The expression common law in a broad sense refers to all that part of the positive law, juristic theory and ancient custom of any state or nation which is of general and universal application, thus marking off special or local rules or customs. See *Blacks Law Dictionary*. 6th ed. 1990. p. 276.

⁵⁷ s. 180 (1) (b).

developments of the common law and doctrines of equity of other countries into Tanzania.⁵⁸

The Act also qualified the application of the statutes of general application in the territory. Section 180 (2) excluded from application in the country statutes of general application in force in England on the twenty-second day of July 1920 which had not been declared by a court to be part of the local law.

This opens up a new chapter. It is a freedom given to players in land matters to borrow applicable legal principles and apply them in the land disputes in the country. However, the courts need to be satisfied that the common law and equity is suitable in the country.

2.1.5 Indian law

Indian statutes were applied to Tanzania by virtue of article 17 (2) of the Tanganyika Order in Council, 1920. The provision stipulates that the civil jurisdiction of the High Court should be exercised in conformity, among others, with the Civil Procedure Code of India and other Indian Acts which were in force in the territory on the twenty-second day of July 1920 or which were to be applied in the territory. Therefore Acts such as the Indian Limitation Act, 1908, the Indian Succession Act, 1865, Sale of Goods Act, Indian Companies Act, 1913, and Indian Contract Act, 1872 were applicable.

⁵⁸ See *Hassanali R. Dedha v The Special Commissioner and Acting Commissioner of Lands* [1957] EA 104 CA, p. 107 on the discussion on the use of expression.

With independence in 1961, the contents of article 17 (2) of the Tanganyika Order in Council were re-enacted almost verbatim in section 2 (2) of JALO. This was done despite the fact that section 2 (2) did not mention the Indian statutes, but made applicable written laws which were in force in Tanganyika on 9th December 1961. It is on this basis that the Indian statutes in force continued to apply in the country subject to the conditions and limitations prescribed. However, after independence almost all of the Indian statutes except the Succession Act 1865 were replaced by the local statutes.⁵⁹ Even the local statutes are worded very similarly to the Indian statutes relating to the subjects. In this, the Indian authority and juristic opinion remain very useful in the country.

2.2 The role of English common law

The English law has a profound influence on the Tanzania legal system. The reason is historical. It was instilled during the colonial time and its legacies exist to date. There are different ways in which the English law became applicable in other countries. As a result of English settlement,⁶⁰ English law provided the basis of the legal system of the acquired territory. The position was that the English settlers in the occupied territory took with them the system of English common law so far as it is applicable to the new environment.⁶¹

⁵⁹ For instance the Indian Limitation Act, 1908 was repealed by the Law of Limitation Act, 1971, Act No. 10 of 1971; Indian Contract Act, 1872 by Law of Contract Ordinance Act, 1961 (Cap. 443), Act No. 1 of 1961; Indian Companies Act, 1913 was repealed by Companies Ordinance, 1932 (Cap. 212). Cap 212 is repealed by Companies Act, 2002, No. 12 of 2002. Companies Act, 2002 is not in force.

⁶⁰ The expression English settlement is used to include some of territories which were in fact not acquired by settlement. These include territories which were acquired by cession, conquest and Annexation. See Robert-Wrays, K. *The Commonwealth and Colonial Law*. pp. 98-112.

⁶¹ *Pictuo Municipality v Geldert* [1893] AC 524; *Cooper v Stuart* (1889) 14 App. Cas. 286 in Hood Phillips, O. & Hudson, A. H. *O Hood Phillips First Book of English Law*. 8th ed. p. 7. Ceded or conquered

The Tanzania situation is different. Being a former German colony, it was placed under Crown protection as a mandated territory created by article 22 of the Charter of the League of Nation after the German defeat in World War I. This was converted into a trustee territory of the United Nations in 1945. Under the system, the Crown as an administrator, among others, could enact the law and set the judicial administration for the territory. The history of the country, made the English law applicable. As a result, most of the laws applicable in the country are either amended colonial pieces of legislation or laws which borrowed heavily from the English legal system.⁶² There are other colonial pieces of legislation which did not come direct from England, but rather via India. All these laws form the foundation upon which the courts decide cases.

In fact from the beginning, the English law applied in the country was not taken wholeheartedly, but was applied subject to qualifications. The proviso to article 17 of the Tanganyika Order in Council, 1920 and section 2 (2) of the JALO stipulates in unequivocal words the need to qualify the English law to suit the local circumstances of Tanzania before it can be applied in the country. Indeed Lord Denning in *Nyali Ltd v Attorney General*,⁶³ cautioned on the application of English laws in foreign countries without qualification. In interpreting the proviso to article 15 of Kenya Order in Council of 1902⁶⁴ stating that the common law is to apply “subject to such qualifications as local circumstances render necessary,” his Lordship stated:

territories usually retained their own law unless it was altered by legislation of the Crown Parliament; see *Sammur v Strickland* [1938] AC 678 in Hood Phillips.

⁶² For instance English Statute of Frauds, 1677, Companies (Winding Up) Rules, 1929.

⁶³ (1955) 1 All E.R. 646 at 653.

⁶⁴ Art. 15 of the Kenya Order in Council, 1902 is styled in similar wording with art. 17 of the Tanganyika Order in Council, 1920 and s. 2 of the JALO.

“This wise provision should, I think be liberally construed. It is a recognition that the common law cannot be applied in a foreign land without considerable qualification. Just as with the English Oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These offshoots must be cut away.”

This statement is relevant in Tanzania. Mwalusanya J (as he then was) adopted this advice on the need to qualify the English law to fit local circumstance in the case of *Ephrahim v Pastory and Another*.⁶⁵

The local practices of the courts in the country draw from the English legal system which impacts on the approach to each matter and the nature of the proceeding. It follows from the adversarial system that ultimately winner takes all and loser loses all which is a departure from the traditional conception of justice that emphasises reconciliation of the parties.⁶⁶ The system of precedent and *stare decisis*,⁶⁷ both English in origin, is well

⁶⁵ High Court of Tanzania at Mwanza (PC) Civil Appeal No. 70 of 1989 (unreported).

⁶⁶ Gluckman, M. *The Ideas in Barotse Jurisprudence*. New Haven: Yale University Press, 1965. p. 13. Also see Gluckman, M. *The Judicial Process Among the Barotse of Northern Rhodesia*. Manchester: Manchester University Press, 1955. p. 54 where he observed that in a society the need to reconcile the parties is

established in the courts' practices in Tanzania. The practice in the English legal system is that the decisions of the House of Lords, which is the highest court, bind the subordinate court and itself, although the court can depart from its previous decision when it appears right to do so.⁶⁸ The same is the practice of the Court of Appeal of Tanzania the decision of which binds the subordinate courts and itself.⁶⁹

At the time when the Judicial Committee of the Privy Council was the final appellate court in Tanzania, their decisions were binding upon the local courts. Since the abolition of appeals from Tanzania in 1962⁷⁰ and the introduction of the Court of Appeal for Eastern Africa (EA) as the final appellate court for the three East African countries of Tanzania, Kenya and Uganda, its decisions are no longer binding. Because of the fact that the Privy Council as the final appellate court did not consider itself absolutely bound by its own decisions, the EA adopted similar position. By adopting the function of the Privy Council, the court inherited the Privy Council's decisions and hence could depart from them. This was stated in *Dodhia v National Grindlays Bank Ltd. and Another*⁷¹ that:

“this court has now taken over the functions of the Privy Council as the final court of appeal for the three East Africa countries. Thus the previous decisions of the

important in cases between people who are linked in permanent relationship as kinsfolk etc, but unnecessary for strangers who are just associated in affairs such as business dealing.

⁶⁷ *Stare decisis* means stand by its own decisions. See *Black Law Dictionary* p. 1406.

⁶⁸ See *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234. Also in *Young v Bristol Aeroplane Co. Ltd* [1944] 2 All ER 233 at p. 300, Lord Green M. R. stated that the Court of Appeal is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction unless it is satisfied that they were given *per incuriam*. See also Geldart, W. *Introduction to English Law*. 11th ed. Oxford: Oxford University Press, 1995. p. 7.

⁶⁹ One may speculate on the values of the decisions of the Tanzania Court of Appeal once the re-established Court of Appeal for East Africa starts to operate. It is undoubted that its decision will bind Tanzania courts. s. 11 of the Appellate Jurisdiction Act, 1962 (Cap. 507).

⁷¹ [1970] EA 195 at pp. 199-200. *Dodhia case* could be contrasted with another decision of the Court of Appeal of East Africa in *Kiriri Cotton Company v Dewani* [1958] EA 239 given while the Privy Council was the final appellate court in East Africa. The Court of Appeal of East Africa held it is bound by the decisions of the Privy Council.

Privy Council on appeal from Kenya, Tanzania and Uganda are of precisely the same nature as previous decisions of this Court given after it became the final Court of Appeal for those countries”.

However, the decisions of the Privy Council hearing an appeal from Tanzania setting the position of the English law given while it was the final appellate court in Tanzania continued to be binding.

When the appeals to the EA were abolished in 1977, the established Court of Appeal of Tanzania (CAT) inherited the function of the EA as the final appellate court. It considered itself bound by its previous decisions but could depart from them if appeared right to do so. The CAT in *Jumuiya ya Wazazi Tanzania v Kiwanda cha Uchapishaji cha Taifa*⁷² stated that historically this court is the successor to the EA in respect of the United Republic of Tanzania. The EA had jurisdiction to overrule its earlier decisions within the scope stated in *Dodhia v National Bank Ltd and Another*. Thus as a successor of the former court, it stands in the same position as its predecessor.

The Court stated further that under the common law doctrine of precedent which is one of the pillars of the law in the country, all courts and tribunals below this court are bound by the decisions of the court regardless of their correctness. As a result of the adherence to the principle of precedent, the English decisions of the common law and the doctrine of equity in force in England at the date of reception decided before date of reception are

⁷² [1988] TLR 146.

binding authorities in the courts of the territory.⁷³ In like manner, the English decisions on the statutes *in pari materia* to Tanzanian statutes are highly persuasive, so are decisions after the reception date which explain the established principles of law.⁷⁴ In general the common practice of referring to English decisions, some recent, is probably because of the shortage of local precedents in some areas of the law, as opposed to the ready availability of the English precedents.

As already pointed out, customary laws form a bulky part of the law in general and land law in particular. The English law had an impact on the customary law as well. This arises from the fact that the customary law had to pass the infamous repugnancy test.⁷⁵ For a long time, customary laws were to be applicable only if they were not repugnant to justice and morality. The issue was whose justice and morality? It was the justice and morality of the English people upon which customary law was measured.

In *Gwao bin Kilimo v Isunda bin Ifunti*,⁷⁶ a father's cattle were seized in compensation for a theft committed by his son. The first issue was whether there is a native law of the Turu (tribe in Singida) which allowed the seizure of the father's property in compensation for a wrong done by his son. The second was, if so, whether that law should guide the British court by virtue of article 24 of the Tanganyika Order in Council. It was held that even if the native law existed allowing the seizure of the father's cattle in

⁷³ Decisions of the English Courts in question are the decision of the highest Courts in England.

⁷⁴ Allott, A. *Essays in African Law*. p. 32.

⁷⁵ See art. 24 (1) of the Tanganyika Order in Council and s. 9 of JALO. The only difference between the two provisions is that while art. 24 (1) enact for the application of customary law provided it is not repugnant to "justice and morality", s. 9 provide for the application of customary law if not repugnant to "justice or morality" hence lowering the threshold.

⁷⁶ (1948) T.L.R 403. See also Allot, A. *Essays in African Law*. pp. 200-201.

compensation for the theft committed by his son, that law would not justify the attachment of the father's property in execution of a civil judgment against his son, even taking into account the provisions of article 24 of the Tanganyika Order in Council, 1920.⁷⁷ The court stated further that native law was certainly contrary to the principles of British justice that the sins of sons should be visited on the fathers, when the sons are themselves fully responsible in law. Decisions based on the strong belief that customary law should be measured according to the justice and morality of people who need not understand and appreciate Tanzanian customs had an impact in customary law of the country.

The availability of text books on English law and the reported English cases in the form of Law Reports makes it inevitable that English law resources whether applicable or not will be referred to regularly. Now after the enactment of section 180 (1) of the Land Act, 1999, the relevant substance of common law and the doctrines of equity from other Commonwealth countries can be applied in the country as well. In addition to that, information such as reported cases from other countries is increasingly becoming available online. This development in principle should diminish the role of the English law in the country although in practice, an established tradition of referring to English cases will remain. The availability of other sources and the invention of forms of references for instance internet sources, opens up a pool of readily available sources in which people could go to for references not only English law.

⁷⁷ At p. 405.

2.3 The choice of law to regulate transactions in land

From the discussion above on the source of law, it is noted that there existed various bodies of law which regulate transactions in land. The issue is which law to apply or how do we determine which law to apply in a given transaction.

The wording of section 180 of the Land Act, 1999 clearly indicates that the Act or the written law provides for the day to day governance of matters concerning registered land in the country. The written laws do not apply in isolation; they are applicable subject to the Constitution. In addition, the Land Act, 1999 provides that in implementing, interpreting and applying the Land Act, 1999, courts should use customary laws of Tanzania and the substance of common law and the doctrines of equity as applied from time to time in any other countries of the Commonwealth which appear to the courts to be relevant to the circumstances of Tanzania.

In practice, there is a tendency to consult the received laws, in this regard the English law as a whole in interpreting and applying the written laws in the country. As already observed, the country follows a common law system and as a result our laws and practice borrow substantially from English law.

However it is doubtful whether parties may by agreement decide that for their purpose, the English law shall regulate the transaction regarding disposition of land and hence suspending the application of domestic laws notably the Land Act, 1999. This is because

the English laws were meant to assist the written laws in the country and not to replace the laws. Article 17 of the Tanganyika Order in Council, 1920 and section 2 (2) of JALO provides that the jurisdiction of the High Court shall be exercised in conformity with the written laws which are in force or may be applied or enacted in the country. It is provided further that where the written laws do not extend or cover an aspect in question, the Courts are required to apply the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the twenty-second day of July 1920.

It is clear therefore that the English law was to fill the gaps in the existing written laws. However, before the enactment of the Land Act, 1999, there was no comprehensive legislation to regulate most of the dealings in land. This, together with section 2 (1) of the Land (Law of Property and Conveyancing) Ordinance (Cap. 114) justified the wholesale adoption and application of the English laws and practice in property in the country. With the enactment of the Land Act, 1999, transactions in land must satisfy the provisions of the Act. Notably, section 61 preserves exclusive application of the Act on matters related to disposition of registered land.⁷⁸ Section 61 (1) states:

(1) No right of occupancy, lease, or mortgage shall be capable of being disposed of or dealt with except in accordance with this Act, and any attempt to dispose of any right of occupancy, lease or mortgage otherwise than in accordance with this Act, shall be ineffectual to create, extinguish, transfer, vary or affect any right or interest in land, or in right of occupancy, lease or mortgage.

⁷⁸ For the meaning of registered land, see Chapter Three, part 3.2 below.

The English law retained its historical role assisting the courts in implementing, interpreting and applying the Land Act, 1999 and in determining disputes about land arising under the Act or any other written law.⁷⁹

On the other hand, apart from the role of customary law in assisting the courts in implementing, interpreting and applying the Land Act, 1999 etc,⁸⁰ customary law applies in general between members of a community in which the rules of customary law relevant to the matter are established and accepted or between a member of one community and a member of another community if the rules of customary law of both make similar provision for the matter.⁸¹ Specifically, customary laws apply to matters relating to disposition of customary rights of occupancy and of dealings in land held under customary law.⁸² The Land Act, 1999 excludes its provisions on disposition in dealing under customary law. Section 61 states:

(2) The provisions of sections 61 to 166 of this Act shall not, unless otherwise expressly declared to do so, apply to a disposition of or dealing with land carried out or executed in accordance with customary law.

(3) For avoidance of doubt disposition of customary rights of occupancy shall be governed by customary law.

⁷⁹ s. 180 (1) (b) of the Land Act, 1999.

⁸⁰ s. 180 (1) (a) of the Land Act, 1999.

⁸¹ s. 9 (1) (a) of JALO.

⁸² See part 2.1.3 above. See also s. 20 (1) of the Village Land Act, 1999.

The customary law applicable is the customary law of the community in which the transaction took place⁸³. It is applicable subject to the written laws and the Constitution.⁸⁴

2.4 Creation of the common land law of Tanzania

As shown from the discussion above, written law (statute) provide the primary governance of dealing in land. This is supplemented by rules of customary law and English common law (received law). Customary law on its own may govern transactions in land. Parties may enter into a transaction which expressly or impliedly intends to be governed by customary law.

There has been an effort to create a common land law of Tanzania. It is a culling process involving selecting and integrating the useful principles of the written laws, received law notably English common law and doctrines of equity, customary and Islamic law into a comprehensive body of law. The envisaged common land law of Tanzania is supposed to be the law that would be easily understood by the majority. The law which is standardised and cut across the whole section of the population. In general it is the law that will fulfil the national goals and address the distinct needs of the people. The effort to create the common law of Tanzania, though not express, could be inferred since independence. Many enacted laws and policies aimed at excluding some English legislation and principles, which were seen to contradict the people's understanding of the matters and rights attached to land. This is what James called "statutory exclusion of

⁸³ See s. 18 (1) (d), and 20 (4) of the Village Land Act, 1999. Also s. 9 (3) of JALO.

⁸⁴ See s. 20 (2) of the Village Land Act, 1999.

specific English enactments". For instance, the Land (Law of Property and Conveyancing: Application of English Acts) Order conferred on the President power by order in the Gazette to declare invalid any English Act of Parliament which was or was not in force in Tanzania.⁸⁵ Through that power, many English statutes were declared inapplicable.⁸⁶

From the point of view of the leaders at the time, selling of land was seen as a danger lest all land pass to the foreigner. Therefore, the government policy adopted one of the accepted traditional principles of land ownership in favour of communal ownership of land as opposed to individual, making land not readily available in the market.⁸⁷ The then president Nyerere is quoted to have said, if people are given land to use as their property, then they have the right to sell it. It will not be difficult to predict who in fifty years time will be land lord and who the tenants. It was thus accepted that, in fact people do not own the land, but just the product of their labour which had the effect of adding value to the land.⁸⁸

The abolition in part of English property law and the need to provide for local wants in a manner consistent with local policy have led to the creation of new systems not found in

⁸⁵ James, p. 35.

⁸⁶ James, p. 36. These statutes included the Dower, Fines and Recoveries, Inheritance, Prescription and Real Property Limitations Acts.

⁸⁷ There are conflicting accounts on the African traditional ownership of land whether it is communal or individual. In Tanzania, that debate is alive. The country housing more than one hundred and twenty tribes, it is imperative that different land ownership system can be observed in different localities.

⁸⁸ This came to be known as Nyerere Doctrine of Land Value. See a pamphlet entitled "National Property" (*Mali ya Taifa*) in Nyerere, J. K. *Freedom and Unity/Uhuru na Umoja: A Selection From writing and Speeches 1952-1965*. Dar es Salaam: Oxford University Press, 1966. p. 53-58.

England and incompatible with some of the basic principles of English law.⁸⁹ Before 1963, there were four main categories of land tenure namely: freehold, leasehold, granted right of occupancy, and deemed right of occupancy. The freehold titles which were first granted by the German colonial government by virtue of the German Imperial Decree of 1895, subsisted during the English colonial time until 1 July 1963 when they were converted into government leasehold of 99 years by the Freehold Titles (Conversion) and Government Leases Act, 1963 (Cap 523). Cap 114 supplemented these statutory provisions before the Land Act, 1999 repealed it. The freehold system in the literal sense was an absolute ownership of land in which the interest in land survives to the heirs from the original tenant,⁹⁰ while the government leasehold was the system where the government sanctioned the land ownership by granting a renewable lease for a period not exceeding 99 years.⁹¹

The promulgated Government Leaseholds (Conversion to Rights of Occupancy) Act, 1969⁹² converted government leasehold into the right of occupancy.⁹³ As a result, the beginning of the 1970s land in Tanzania was held only under the right of occupancy system either granted or deemed right of occupancy.

⁸⁹ James, R. W. & Fimbo, G. M. *Customary Land Law of Tanzania, A Source Book*. Nairobi: East African Literature Bureau, 1973, p. 31. Also, see James, pp. 36, 138.

⁹⁰ See Megarry, R. *A Manual of the Law of Real Property*. 7th ed. London: Sweet & Maxwell, 1993. p. 24.

⁹¹ There were lesser leases as well. See James, pp. 138-166.

⁹² Act No. 44 of 1969.

⁹³ James, p. 164.

The right of occupancy system, the system where the government offers titles to the user and occupier of land, was a new system in Tanzania.⁹⁴ The right of occupancy system was first introduced in 1923 by the Land Ordinance (Cap. 113) copied from the Native Rights Ordinance of Northern Nigeria.⁹⁵ Thus, conversion of titles held under freehold system to the current right of occupancy was to conform to the independent government policy of socialism because the freehold system was always regarded as being foreign to the Tanzanian basic conception of ownership and was associated with colonial exploitation and domination.⁹⁶ In addition, the freehold system was seen as incapable of safeguarding people's interest by sidelining the government control suggesting the possibility of alienating the whole land in Tanzania to the foreigner. The effect of this was to exclude large parts of the English property law.⁹⁷

There is an effort to unify, codify and modify customary law in the country. With more than one hundred and twenty tribal groups professing more or less different customary law in issues relating to the land, the unification process is important. In the same way, codification of customary law to make it easily ascertainable is important. The duty is entrusted to the district council to record in writing what in their opinion is the local customary law relating to different subjects including land issues in the area.⁹⁸ So far codification of customary laws relating to bride wealth, marriage and divorce, status of

⁹⁴ The right of occupancy is defined in s.2 of the Land Act, 1999 as "a title to the use and occupation of land and includes the title of a Tanzanian citizen of African descent or a community of Tanzanian citizens of African descent using or occupying land in accordance with customary law".

⁹⁵ No. 1 of 1916.

⁹⁶ James, p. 140.

⁹⁷ James, p. 36. Also see the Court of Appeal decision in *Abualy Alibhai Azizi v Mbatia Brothers Ltd* Misc. Civil Appeal No. 1 of 1999 (unreported) at 13 where it was stated by the way of *obiter* that "there is now no freehold tenure in Tanzania".

⁹⁸ s. 9A of JALO. Also see Cotran, p. 119.

children, as unified and codified is contained in a Schedule to the Local Customary Law (Declaration) Order, 1963,⁹⁹ and for codification of customary laws relating to the guardianship, wills and intestate succession is contained in Local Customary Law (Declaration) No. 4 Order, 1963.¹⁰⁰ The unified and codified laws have been adopted by some district councils with or without modifications.¹⁰¹

The Land Act, 1999 went a step further to impose a duty on the courts to develop a common land law of Tanzania. Section 180 states:

(3) “..., it shall be the duty of all courts in interpreting and applying this Act and all other laws relating to land in Tanzania to use their best endeavours to create a common law of Tanzania applicable in equal measure to all land....”

To assist in that, the law requires the translation of the Act into Swahili, the commonest language in the country.¹⁰² This could be followed by simplifying this difficult body of land law, to make it accessible not to lawyers only, but to laymen as well. However, the efforts to liberate or sever the legal system from a profound English influence have not been successful. Its roots in the local legal system are substantial. A number of instances have been satisfactorily legislated so far, but on several occasions, within the whole body

⁹⁹ GN No. 279 of 1963.

¹⁰⁰ GN No. 436 of 1963.

¹⁰¹ So far I am not aware of any government notice declaring the codification of the customary laws on land ownership per se. Therefore, we have to rely on account of the familiar with particular customary laws, decided cases on customary law in question and writings on customary laws in general or of a particular community.

¹⁰² s. 185 of the Land Act, 1999.

of codified law, circumstances have emerged which are not provided for. The practice is, in case of a lacuna in the law one has to fall back on the English common law.¹⁰³

¹⁰³ See *Tanganyika Garage Ltd v. Marcel Mafuruki* (1975) LRT No. 23 at 99, where it was stated that where the circumstances of the contract are not provided for in the codified law of contract in Tanzania, one must fall back to the English common law. Though based on contract law, the principle laid down could be stretched to other areas of law as well.

CHAPTER THREE

THE CONCEPT OF SECURITY IN LAND

3.1 Introduction

In a lending - borrowing transaction, a creditor may be willing to rely solely on his debtor's promise to fulfil his contractual obligation of paying the debt. This is a common practice in Tanzania where lenders advance unsecured credit relying solely on the promise to pay back. The issuance of unsecured credit is common especially where a small sum of money is involved (small scale loans). However, where a huge sum of money is involved creditors do want something more than a mere promise to repay the money, they may demand and accept securities.

The word "security" means an interest which the debtor confers on the creditor in an item of property owned by himself or, by arrangement, in the property of some third party such as a surety.¹ The arrangement in the property of the third party may be in the form of a guarantee or an indemnity.² The arrangement in the property of the third party can also be in the form which the borrower could provide but had to be provided by a third

¹ The word "security" is sometimes used to mean shares or debentures furnished by the borrowers to a lender to secure a loan or an advance, or used to describe a negotiable instrument issued to secure instalments due under a credit facility, see Ellinger, E. P. and Lomnicka, E. *Modern Banking Law*. 2nd ed. Oxford: Clarendon Press. 1994, p. 632.

² Guarantees and indemnities are arrangements in which a third party, the surety, agrees to assume liability if the debtor defaults or causes loss to the creditor respectively.

party.³ The important fact is that the interest acquired by a creditor must confer on him a right to satisfy the debt out of the proceeds of the property in question.⁴

As it was observed in the field research, there are different kinds of security arrangements (products) in Tanzania which cater for different business ventures or target people in different economic sectors. Apart from unsecured credit to small businesses or individuals involving small sums of money, creditors do advance credit facilities to salaried employees. Bankers then effect repayment by deducting every month a certain percent of the employee's salary and applying it to repaying the debt.⁵ In this scheme the creditor relies on the employee's promise to pay and his employer's commitment to facilitate that repayment.⁶ One of the difficulties of this loan scheme is the near impossibility of recovering the money owed when the employee's employment terminates. This is based on the fact that generally the terminal benefits can not be attached in respect of any debt.⁷ There is also another loan scheme targeting farmers who in exchange for the credit facility offered, charge their future crops output.⁸ In most cases the decision about the nature of security to be demanded or offered is determined mostly by the amount involved, that is, the bigger the sum, the more the need for security. The availability of a preferred security is also an important factor.

³ See Chapter Five, part 5.3.5 below.

⁴ Ellinger, p. 632.

⁵ A borrower must maintain an account with the bank and then the bank can deduct around 20% of his salary and apply it toward the repayment.

⁶ See article by Joyce Mkinga dated 16 February 2005 titled Barclays loan scheme promotion targets employees available in <http://www.ippmedia.com> accessed in February 2005.

⁷ See s. 33 of the Parastatal Pensions Scheme Act, 1978, Act No. 14 of 1978.

⁸ See article by Felix Andrew dated 18 November 2004 titled Standard Chartered Bank starts loan scheme to farmer available in <http://ippmedia.com> accessed in November 2004.

Security can be personal or real. Personal security consists of the contract of guarantee, whereby the guarantor promises to answer for the obligation of the debtor should the debtor default.⁹ A contract of guarantee involves two obligations. There is a principal obligation of the principal debtor (principal) to honour his contractual obligation, and a secondary obligation assumed by the guarantor or surety. The secondary obligation gives the creditor a secondary contractual action against the guarantor should the principal default.¹⁰ Personal securities are not the subject of this study. Real security gives the creditor rights over property charged as security. The property may be real, such as land, or personal.

Real security can be categorised into proprietary security and possessory security. Possessory security, such as a pledge or a lien confers on the creditor only possession of the property with or without power of sale. It depends on the creditor obtaining the possession of the property.¹¹ On the other hand, proprietary security vests on the creditor proprietary rights over the subject matter of the security without him obtaining possession of the property.¹² The debtor or owner may retain possession of the property and is able to employ it to carry on his business, but the creditor has power to realise the subject matter in the event of the debtor becoming insolvent or failing to fulfil his obligations.¹³ A mortgage of land is a good example.

⁹ F & L p. 3.

¹⁰ See O'Donovan, J. and Phillips, J. *The Modern Contract of Guarantee*. London: Sweet and Maxwell. 2003, pp. 8 – 13.

¹¹ F & L p. 4.

¹² F & L p. 3.

¹³ See Tan, L. G. L. *The Law Relating to Bank Finance of Companies*. Ph. D thesis, University of Birmingham, 1992, p. 68.

Real security may be created by contract taking the form of mortgage, which may be defined as a conveyance of land or assignment of chattels as security for the payment of a debt or the discharge of some other obligation for which it is given.¹⁴ It may also take the form of a pledge which is a security created by contract and effected by a bailment of a chattel or document of title to the creditor to be kept by him until the debt is discharged.¹⁵ The pledge gives security to the creditor by giving possession over the property to him, not proprietary title.¹⁶ As far as pledge is concerned, the ownership of the property is retained by the borrower, but the lender is given an implied contractual right to sell pledged goods on default by the borrower.¹⁷ Real security may be created by a charge over land where land or property is expressly or constructively made liable for the discharge of a debt or any other obligation.¹⁸

Real security may also arise by operation of law in the form of a lien. A lien is right conferred upon a person to retain possession of, or to have a charge upon, the real or personal property of another, until certain demands are satisfied.¹⁹ All these forms of securities are aimed at protecting creditors against borrowers who have failed to honour their obligations. The mortgage of land is the subject of this study. Therefore, rights in

¹⁴ For the definition of mortgage see Lindley MR in *Santley v Wilde* [1899] 2 Ch 474, CA; *London County and Westminster Bank Ltd v Tompkins* [1918] 1 KB 515, CA. Mortgage will be discussed in detail below.

¹⁵ See F & L p. 4. See also *Re Morrit* (1886) 18 QBD 222 at 232, *Yungmann v Briesemann* (1893) 67 LT 642. At common law a pledge is complete if there is actual or constructive delivery of the goods to the pledgee, see *Donald v Suckling* (1866) 1 QB 585 at 613 per Blackburn J., *Dublin City Distillery v Doherty* [1914] AC 823 per Lord Atkinson. Also s. 124 and s. 125 of the Law of Contract Ordinance (LCO) (Cap. 443).

¹⁶ See Megarry, R. *A Manual of the Law of Real Property*. 7th ed. London: Sweet & Maxwell, 1993. p. 438.

¹⁷ See Skirrow, M. J. *The Law Relating to the Loan Financing of Companies*. Ph. D thesis, University of Birmingham, 1988, pp. 3-10. See also ss. 128 and 129 of LCO.

¹⁸ See Chapter Four, part 4.5 below.

¹⁹ Lien may also arise from contract, see *Re Bond Worth Ltd* [1980] Ch 228 at 250, [1979] 3 All ER 919 at 940; also F & L p. 4.

land that can be mortgaged in Tanzania are discussed below. It is also important to discuss rights in land at common law and customary law as part of the law in Tanzania.

3.2 A general overview of land tenure

A quick overview of land tenure in Tanzania is important. It highlights issues among others as to who could hold the land, from where and under what terms. The discussion of these issues would shed light on whether companies or individuals either citizens or foreigners could hold and deal with land in the country. These facts ultimately affect the market in land.

All land in Tanzania is public land²⁰ vested in the President as trustee for and on behalf of the citizens. It was declared under section 3 (1) of the Land Ordinance (Cap. 113) that all land in Tanganyika whether occupied or unoccupied was public land. Section 4 went on to place all public land under the control of the president.²¹ The Land Act, 1999 restates an established position by declaring that all land in Tanzania shall continue to be public land.²² Public land is categorised into three categories:²³

- (a) general land;²⁴
- (b) village land;²⁵

²⁰ Land Act, 1999 defines public land to mean “all the land of Tanzania”, see the definition section.

²¹ Initially the Land Ordinance vested all land in the Governor; the word “Governor” was replaced by “President”.

²² s. 4 (1) of the Land Act, 1999 states that “all land in Tanzania shall continue to be public land and remain vested in the president as trustee for and on behalf of the citizens.”

²³ s. 4 (4) of the Land Act, 1999.

²⁴ General land means all public land which is not reserved land or village land and includes unoccupied or unused land. See s. 2 of the Land Act, 1999 (definition section).

(c) reserved land.²⁶

The President may transfer land from one category to another.²⁷ The transfer of land from one category to another, for instance, from general or reserved land to village land may or may not affect the rights of the persons in occupation of the land before the said transfer is effected. The Land Act, 1999 provides that where a granted right of occupancy exists in any transferred land, the transfer unless otherwise provided shall operate as a compulsory acquisition of that right of occupancy, but where persons are occupying and using the general transferred land under a customary right of occupancy, the transfer of that land to village land shall not, of itself, affect the rights of such persons to continue to occupy and use the land.²⁸

The President is the paramount landlord in Tanzania. He controls the whole land. As a result any person²⁹ occupying land in Tanzania is doing so either because he has been granted that land by the President or because it is deemed to have been granted by him. The common tenure is the right of occupancy, which may be a granted, or a customary (deemed) right of occupancy. A right of occupancy is defined to mean “a title to the use

²⁵ Village land means the land declared to be village land under section 4 of the Land Act, 1999 and section 7 of the Village Land Act, 1999 and includes any transfer of land or land transferred to a village. See the definition sections (s. 2) of the Land Act, 1999 and the Village Land Act, 1999.

²⁶ Reserved land means all land which is reserved or designated or set aside for some purpose such as forests, national parks, wildlife conservation or urban development etc. See s. 6 of the Land Act, 1999.

²⁷ s. 4 (7) and 5 of the Land Act, 1999.

²⁸ s. 5 (7) and (8) of the Land Act, 1999

²⁹ A person must be a citizen of Tanzania either as an individual person or a group of persons, an association or a corporate body etc; see s. 19 (1) of the Land Act, 1999. A non-citizen person or persons can only obtain a right of occupancy or a derivative right for the purpose of investment approved under the Tanzania Investment Act, 1997, see s. 19 (2) (a) and (b) of the Land Act, 1999 as amended by the Land (Amendment) Act, 2004. But s. 19 (2) (c) of the Land Act, 1999 as amended by the Land (Amendment) Act, 2004 allows a Tanzanian citizen to transfer a partial interest in land to a foreigner for the purpose of investment. A grant of land for investment purpose is the only way a foreigner can be allocated land in Tanzania, see s. 20 of the Land Act, 1999.

and occupation of land and includes a title of a Tanzanian citizen of African descent or a community of Tanzanian citizens of African descent using or occupying land in accordance with customary law”.³⁰

The customary right of occupancy, which is regulated by customary law,³¹ is basically a common and traditional way in which people acquire and hold land. A customary right of occupancy is deemed to have been granted by the president and may be granted over village or reserved land.³² In addition a person may hold land under a customary right of occupancy over general land if he occupied the said land before the coming into operation of the Village Land Act, 1999.³³

However, the President grants a granted right of occupancy.³⁴ It is granted under section 29 of the Land Act, 1999 over the general or reserved land.³⁵ Before the Land Act, 1999 came into force in 2001, granted rights of occupancy were granted under either section 6³⁶ or section 12³⁷ of Cap. 113. Granted rights of occupancy were usually grouped into: long term rights which were granted for a period of over five years; short term rights

³⁰ See the definition section of the Land Act, 1999. Also see s. 2 of the Land Ordinance (Cap. 113). The recognition of customary title was added in the definition of the right of occupancy in 1928, Ordinance 7 of 1928.

³¹ s. 20 (1) of the Village Land Act, 1999.

³² s. 18 (1) (b) of the Village Land Act, 1999.

³³ s. 14 (1) of the Village Land Act, 1999.

³⁴ The Commissioner for Land holds the delegated power to grant a granted right of occupancy on behalf of the president. See s. 10 (2) of the Land Act, 1999 and note 16 above.

³⁵ s. 22 (1) (b) of the Land Act, 1999.

³⁶ s. 6 empowered the president the right to grant a granted right of occupancy, the function which is exercised by the Commissioner for Lands. Initially the power was transferred to the Minister responsible for lands, see Transfer of Powers and Duties (Consolidation) Order, 1962, GN No. 478 of 1962, made under the repealed Transfer of Powers Ordinance (Cap 444), but saved by s. 5 (2) (b) of Transfer and Delegation of Powers Act, 1962 (Cap 511). Also s. 3 of the Ministers (Miscellaneous Provisions) Act, 1962. The Commissioner for Lands acts on behalf of the Minister. See James, p. 113.

³⁷ s. 12 allowed the President to authorise any administrative officer in charge of the District or sub-District to grants short term grants. See GN No. 266 of 1959.

granted for a period of five years or less; and periodic rights which were granted from year to year or for a period of less than a year.³⁸ For the long term, the commonest duration was twenty-one, thirty-three, sixty-six or ninety-nine years. However the Commissioner for Lands had discretion in the matter.³⁹ A grantee of a right of occupancy was issued with a Certificate of Occupancy which was a document evidencing the right over a piece of land. A certificate of occupancy usually contained among others, names of the occupier and description of the land, terms, purposes and conditions of occupation.⁴⁰

The position survived the Land Act, 1999. The duration for a granted right of occupancy may still be grouped into long term rights granted for a period up to but not exceeding ninety-nine years or for a term together with an option for a further term or terms which together with the original term may be up to but not exceeding ninety-nine years;⁴¹ short term rights for a term of five years or less;⁴² or periodic rights granted from year to year or for a period of less than a year.⁴³ As a proof of title, the grantee of the granted right of occupancy is issued with a certificate of occupancy.⁴⁴ As long as the right holder observes the conditions of occupation, he may continue to enjoy the rights until it comes

³⁸ James, p. 114. See also s. 6 (2) of Cap. 113. A grant of a right of occupancy at will was given recognition in 1960, Ordinance No. 22 of 1960.

³⁹ The President under s. 9 of the Land Act, 1999 appoints the Commissioner for Lands who, among other, is a chief adviser to the Government on all matters connected with the administration of land. From time to time, he is a delegate of the President and/or the Minister responsible for land's power on land administration.

⁴⁰ See an example of the Certificate of Occupancy below.

⁴¹ ss. 22 (1) (e), 32 (1) (a) and (b) of the Land Act, 1999.

⁴² See Proviso to s. 27 (a) of Cap. 334.

⁴³ s. 32 (1) (c) of the Land Act, 1999.

⁴⁴ s. 29 of Land Act, 1999.

to an end and he may be entitled to a renewal.⁴⁵ Failure to observe the conditions of occupation may result in the revocation of the right of occupancy.⁴⁶

The long term rights are compulsorily registrable interests under the Land Registration Ordinance (Cap. 334).⁴⁷ Registration is in the land register. What is registered is the certificate of occupancy and the land registered is a registered land.⁴⁸ Section 27 of Cap. 334 provides in effect that every certificate of occupancy (for long term) made or issued after the coming into force of this Ordinance shall be delivered to the Registrar who shall register the estate in the name of the grantee or occupier. The purpose of registration of title is to easen and quicken conveyancing as the purchaser or any person acquiring estate or interest in the registered land can discover facts or incumbrances attached to that land by a mere inspection of the register.

During registration all the covenants and conditions contained in the certificate of occupancy are recorded in the land register and once recorded run with the land.⁴⁹ In addition, mortgages or charges over land which subsist at the time of registration of the land are registered as incumbrances against the title⁵⁰ and therefore run with the land too.⁵¹ Therefore, any person who acquires any estate or interest in any registered land is deemed to have actual notice of every memorial in the land register relating to that land.⁵²

⁴⁵ s. 32 (3).

⁴⁶ s. 31.

⁴⁷ s. 22 (1) (d) of the Land Act, 1999.

⁴⁸ The Land Registration Ordinance (Cap. 334) does not define “registered land”. However, s. 2 (1) of Cap. 334 define unregistered land to mean land other than registered land.

⁴⁹ s. 28 of the Land Registration Ordinance (Cap. 334).

⁵⁰ s. 29 of Cap. 334.

⁵¹ s. 33 (1) (a) of Cap. 334.

⁵² s. 34 of Cap. 334.

However, one must be aware of an unimpeachable interest over registered land such as the interest of any person in possession of the land whose interest was not registrable under Cap. 334.⁵³ These interests though unregistrable under Cap. 334 run with the registered land.⁵⁴

A short term is registrable under Cap 334 only if the right of occupancy contains an option whereby the occupier may require the president to grant him a further term or terms which together with the original term exceed five years.⁵⁵ Otherwise, one may opt to register the short term by virtue of the Registration of Documents Ordinance (Cap 117).⁵⁶ On the other hand, a grant of a customary right of occupancy is not registered under Cap. 334, but registered with the District Land Officer where the land is situated.⁵⁷ In both cases, what is registered is not the right of occupancy per se, but a certificate of occupancy. Nonetheless, registration makes it easy to ascertain the title of a right holder by a search in the relevant registry.

As can be noted, the right of occupancy is a title to use the land for a certain period of time. The fact that a granted right of occupancy could come to an end or could be revoked creates insecurity and unfavourable environment for a long term investment in property. A more secure form of land ownership would be favourable than the current

⁵³ s. 33 (1) (b) of Cap. 334.

⁵⁴ See s. 33 (1) (b)-(g) of Cap. 334.

⁵⁵ See Proviso to s. 27 of Cap. 334.

⁵⁶ s. 11 of the Registration of Documents Ordinance (Cap. 117).

⁵⁷ s. 25 (2) (d) of the Village Land Act, 1999.

right of occupancy system.⁵⁸ The following is an example of the Certificate of Occupancy issued to a holder of a granted right of occupancy.

THE CERTIFICATE OF OCCUPANCY (Land Form No.22)

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999

(NO. 4 OF 1999)

CERTIFICATE OF OCCUPANCY

(Under Section 29)

Title No.

L.O. No.

L.D. No.

Theday of20.....

This is to certify that

of P.O. Box

(hereinafter called “the Occupier”) is entitled to the Right of Occupancy (hereinafter called the Right) in and over the land described in the Schedule hereto (hereinafter called “the Land”) for a term of years from the first day ofTwo Thousandaccording to the true intent and meaning of the Land Act and subject to the provisions thereof and to any regulations made

⁵⁸ See comment in chapter nine below.

thereunder and to any enactment in substitution therefor or amendment thereof and to the following special conditions:-

1. The Occupier having paid rent up to the day of20..... shall thereafter pay rent of shillingsyear in advance on the first day of July in every year of the term without deduction PROVIDED that the rent may be revised by the Commissioner for Lands.
2. The Occupier shall:-
 - (i) Be responsible for the protection of all the beacons on the Land throughout the term of the Right. Missing beacons will have to be re-established at any time at the Occupier's expenses as assessed by the Director responsible for Surveys and Mapping.
 - (ii) Do everything necessary to preserve the environment and protect the soil and prevent soil erosion on the land and do all things which may be required by the authorities responsible for environment and to achieve such objective.
 - (iii)
 - (iv)
 - (v)
 - (vi)
3. USER:
.....

4. The Occupier(s) shall not assign the Right within three years of the date hereof without the prior approval of the Commissioner.
5. The Occupier(s) shall deliver to the Commissioner notification of disposition in prescribed form before or at the time the disposition is carried out together with the payment of all premia, taxes and dues prescribed in connection with the disposition.
6. The President may revoke the Right for good cause or in public interest.

SCHEDULE

All Land known as Plot No. Block situated atcontainingsquare metres shown for identification only edged red on the plan attached to this certificate and defined on the registered Survey Plan Numbered deposited at the Office of the Director for Survey and Mapping at Dar es Salaam.

Given under my hand and my official seal the day and year first above written.

SEAL

.....
COMMISSIONER FOR LANDS

I/we.....

The within named HEREBY accept the terms and conditions contained in the foregoing Certificate of Occupancy.

1. **SIGNED and DELIVERED**)

By the said)

Who is known to me personally/)

identified to me by.....)

The later being known to me)

personally this)

day of 20.....)

Witness's)

Signature)

Postal Address.....)

Qualification)

2. **SEALED** with the Common)

Seal of)

SEAL

and **DELIVERED** in the)

Presence of us this)

Day of20.....)

Signature)

Name)

Qualification)

Signature)

Name)

Qualification).

3.3 Rights in land at common law

In everyday speech, one tends to associate land with the physical surface of the earth upon which we stand and walk, farm and build. This is an immediate meaning of land that comes to mind. However, in fact, the term land is differently understood and this has an impact on the rights and obligations attached to it.

3.3.1 Meaning of land at common law

At English common law, the term land includes the physical clods of earth which make up the surface layer of land, mines, and minerals beneath the surface, and buildings, or parts of buildings erected on the surface and “corporeal hereditaments”.⁵⁹ It includes also many kind of intangible rights or incorporeal hereditaments such as rights of way over somebody else’s land. These intangible rights are regarded as integral parts of the land in a way that any future conveyance of the land will transfer the land, rights and benefits attached to it.⁶⁰

⁵⁹ Gray, K. J. & Symes, P. D. *Real Property and Real People: Principles of Land Law*. London: Butterworths, 1981, p. 51. Hereditaments signify a right which is heritable that is capable of passing by way of descent to heirs, see *Lloyd v Jones* (1848) 6 CB 81 at 90. Corporeal consist of such as affect the senses, such as may be seen and handled by body, it consist substance and physical objects, while incorporeal are the object of sensation, can neither be seen nor handled, are creatures of the mind and exist only in contemplation, see C & B p. 141.

⁶⁰ Gray & Symes, p. 51.

The extended significance of the term land is sometimes expressed by reference to two Latin maxims. First *cuius est solum eius est usque ad coelum et ad inferos* meaning he who owns the land owns everything extending to the heaven and to the depths of the earth. In principle therefore, the owner of the land owns everything. However statutory provisions qualify the position. As a result the landowner has no right to coal and oil⁶¹ or treasure trove⁶² discovered in his land. The ownership of these things is vested in the state.⁶³

Another important principle is summed up in a maxim *quicquid plantatur solo solo cedit* meaning whatever is attached to the ground becomes a part of it.⁶⁴ According to this, a building constructed on the soil and things naturally growing in the land such as trees, become part of the land.

The effect of the principle *quicquid plantatur solo solo cedit* is also to include objects attached to the building, which would otherwise be personal property and removable to become annexed to the realty and hence regarded as part of the freehold. These objects are commonly referred to as “fixtures”. Fixture is therefore the name used to refer to anything which has become so attached to land as to form part of the land.⁶⁵ Thus if a

⁶¹ Coal Industry Nationalization Act, 1946, Petroleum (Product) Act, 1954. Also see Gray & Symes, p. 51.

⁶² Treasure trove applies to gold and silver discovered in the land. See *Attorney General of the Duchy of Lancaster v G. E. Overton (Farms) Ltd* [1980] 3 WLR 869; Gray & Symes, p. 51.

⁶³ See *Bernstein v Sky views & General Ltd* [1978] QB 479; *Grigsby v Melville* [1974] 1 WLR 80.

⁶⁴ Burke, J. *Jowitt's Dictionary of English Law*. 2nd ed. Vol II. London: Sweet & Maxwell. 1977, p. 1487.

⁶⁵ Megarry, R. *A Manual of the Law of Real Property*. 7th ed. London: Sweet & Maxwell, 1993, p. 15. It is important to note that, in ordinary language one tends to think of a fixture as being something fixed to a building, but a building itself can be a fixture. In *Boswell v Crucible Steel Company* [1925] 1 KB 119 at 123, the issue was whether plate glass windows which formed part of the wall of a warehouse were landlord's fixtures within the meaning of a repairing covenant. Atkin LJ held “... I am quite satisfied that they are not landlord fixtures, and for the simple reason that they are not fixtures at all in the sense in which

building is erected on land and objects are attached to the building, the word land includes the soil, the building and the objects affixed to it, and therefore the owner of the land becomes the owner of the building and things affixed thereto.⁶⁶ It was stated in *Elliot v Bishop*⁶⁷ that “the old rule laid down in the old books is that, if the tenant or the occupier of a house or land annex anything to the freehold, neither he nor his representatives can afterwards take it away, the maxim being *quicquid plantatur solo solo cedit*”.

Since the law treats land and chattels differently, and since a chattel may by being affixed to land, become part of the land, it is necessary to analyse a test which will determine whether or not such a change has taken place.⁶⁸ This is because when land is mortgaged, even though it is not mentioned in the mortgage deed,⁶⁹ the mortgage passes rights to the fixtures to the mortgagee but not rights to chattels.⁷⁰

As pointed out by Blackburn J. in *Holland v Hodgson*⁷¹ for a chattel to become a fixture, two factors have to be considered:

that term is generally understood. A fixture where used in connection with a house, means something which has been affixed to the freehold as accessory to the house. It does not includes things which were made part of the house itself in the course of its construction”. But Goddard CJ in *Billing v Pill* [1954] 1 QB, 70 at 75, [1953] 2 All ER 1061 at 1063 stated “What is a fixture? The commonest fixture is a house which is built into the land, so that in law it is regarded as part of the land. The house and the land are one thing”. The building erected on the land becomes part of the land. See also M & B pp. 90-95; *Elitestone Ltd v Morris* [1997] 1 WLR 687, [1997] 2 All ER 513 for a similar discussion.

⁶⁶ This is the old rule which is now subject to modification.

⁶⁷ (1854) 10 Ex 496 at 507.

⁶⁸ For instance material such as bricks, timbers frames wall, the chipboard ceilings etc, which are chattels when brought on the building site what makes them ceases to be chattels? M & B p. 90.

⁶⁹ See *Vaudeville Electric Cinema Ltd v Muriset* [1923] 2 Ch. 74.

⁷⁰ M & B p. 90, also see Megarry, p. 15. See s. 62 of the Law of Property Act 1925; *HE Dibble Ltd v Moore* [1970] 2 QB 181, [1969] 3 All ER 1465.

⁷¹ [1872] LR 7 CP 328, see *Hellawell v Eastwood* [1851] 6 Ex. 295 at 312.

Firstly, the degree of annexation, and

Secondly, the object of annexation.

As to the degree of annexation, the general rule is that a chattel is not a fixture unless it is actually fastened to or connected with the land or building.⁷² A chattel will remain a chattel if it could be removed without any damage or material injury to the structure to which it is attached.⁷³ For instance, while things such as a machine bolted to the floor may be regarded as part and parcel of the land for the reason that its removal will damage the structure in which it is fastened,⁷⁴ a heavy machine resting on its own weight may remain a chattel.⁷⁵

With regard to the object of annexation, the issue is whether the object is to improve the freehold to which the annexation is made or whether it is the more complete and better enjoyment of the chattel as a chattel.⁷⁶ If it is proved the object is to enjoy the chattel as a chattel, then the owner or his heir will be entitled to remove it.⁷⁷ A good example is given by Blackburn J in the *Holland v Hodgson* stating that blocks of stone placed one on top

⁷² The mere laying of an article in the ground however heavy, upon the land does not prima facie make it a fixture, even though it subsequently sinks into the ground, see M & B p. 143.

⁷³ *Leigh v Taylor* [1902] AC 157 at 160.

⁷⁴ *Reynolds v Ashby & Sons* [1904] AC 466.

⁷⁵ *Hulme v Brigham* [1943] KB 152, [1943] 1 All ER 204. In *HE Dibble Ltd v Moore* [1970] 2 QB 181, greenhouses resting on their own weight on concrete dollies were held to be removable chattels. Also see *Botham v TSB bank plc* (1996) 73 P & CR D1 in which the Court of Appeal held that bathroom fittings, and fitted kitchen units were fixtures but not fitted carpets, curtains, blinds, gas fires, oven, freezer and washing machine.

⁷⁶ *In re De Falbe Ltd* [1901] 1 Ch 523 at 541. Also see *Hellawell v East wood* [1851] Exch. 295 at 312 where it was stated the issue is, was the intention to effect a permanent improvement of land or building as such, or was it merely to effect a temporary improvement or to enjoy the chattel as chattel?

⁷⁷ *In re De Falbe Ltd* involved tapestries affixed by a tenant for life to walls of a house for the purpose of ornament and the better enjoyment of them as chattels. The court held that if proved they were so fixed to enhance their enjoyment as chattels, no amount of annexation would defeat the tenant's rights to remove them.

of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on top of each other in the form of a wall, would remain chattels.⁷⁸

Even in its early development, it was accepted that as a general rule there were categories of fixtures which a person who affixed it or his successor in title could remove whatever the degree of annexation. For instance trade fixtures attached in the land by the tenant for the purpose of carrying on his particular trade,⁷⁹ or ornamental fixtures attached in the realty for the sake of ornament or convenience could be removed. In 1901, Vaughan Williams L. J. stated in *re De Falbe case* that amongst the exceptions to the rigid rule of *quicquid plantatur solo solo cedit* were two, one in respect of trade fixtures, the other in respect of ornamental objects which have been annexed in some way to a freehold. In a later stage, the right to remove agricultural fixtures was provided for by the Agricultural Holdings Act, 1948.

Fixtures impact on a mortgage transaction as they pass with the land to the mortgagee even when not mentioned in the mortgage deed.⁸⁰ The mortgagor in possession is not entitled to remove tenant's fixtures, whether annexed before or after the mortgage transaction.⁸¹ However, where fixtures have been annexed to land by a third party under an agreement between him and the mortgagor which permits him to remove them in

⁷⁸ LR 7 CP 328 at 335.

⁷⁹ See *Poole's Case* (1703) 1 Salk 368; *Elliot v Bishop* (1854) 10 Exch 496; *Smith v City Petroleum Co* [1940] 1 All ER 260.

⁸⁰ *Vaudeville Electric Cinema Ltd v Muriset* [1923] 2 Ch 74.

⁸¹ *Longbottom v Berry* (1869) LR 5 QB 123.

certain circumstances, his rights of removal can not in general be defeated by the mortgagee.⁸²

3.3.2 The common law doctrine of tenure and estate and its application in the country

In practice land is normally described as owned by its various proprietors, English land law still retains its original basis in Crown ownership.⁸³ It is expressed in a feudal law summed up in a maxim *nulle terre sans seigneur* meaning no land without a lord.⁸⁴ A small part being in the Crown's own occupation, the rest is occupied by tenants holding either directly or indirectly from the Crown.⁸⁵

The ownership of land was based on a complex feudal structure which was imposed after the Norman Conquest. The King regarded the whole of England as his by conquest. In rewarding his followers and the English people who submitted to him, he granted them certain land to be held of him as overlord.⁸⁶ These lands were granted not by out-and out transfer, but were to be held from the Crown upon certain conditions. Every grantee might in turn grant land to another person to hold of them in return for services, and that other might do the same.⁸⁷

⁸² *Gough v Wood and Co* [1894] 1 QB 713; see also C & B p. 147.

⁸³ M & W p.12.

⁸⁴ *Black's Law Dictionary*. 6th ed. 1990. p. 1067; also M & W p. 12.

⁸⁵ See *Att.-Gen. of Ontario v Mercer* (1883) 8 App. Cas. 767 at 772.

⁸⁶ M & W p. 12

⁸⁷ M & W p. 12.

Therefore, the feudal system had a pyramidal structure from the top downwards with the King at the top and people who actually occupying the land at the base.⁸⁸ In the middle of the structure were people who both rendered and received services, much in the same way as a modern leasehold tenant who has sublet the property.⁸⁹ The control of the land followed the same hierarchy with the King being the lord paramount looking only to those who held directly from him called tenants in chief. The tenants in chief in return controlled their immediate tenants, and so on down the ladder if there were further steps in the scale to the actual occupier of the land called “tenants in demesne”.⁹⁰

Even in its ancient forms, the feudal services which would culminate in the grant of land became standardised and broken up in sets. Thus there was one set of services which included the provision of armed horsemen for battle which became known as knight’s services, and there was another set which included the performance of some honourable service for the King in person which was known as grand sergeanty. Each of these sets of services was known as a tenure, for it showed upon what terms the land was held.⁹¹ The word tenure therefore signifies a right and mode of holding land.

Land tenure could be granted for different periods of time. It could be granted for life, that is, for as long as the tenant lived, in tail, that is, for as long as the tenant or any of his lineal descendants lived, or in fee simple that is for as long as the tenant or any of his

⁸⁸ M & W p. 12.

⁸⁹ M & W p. 12.

⁹⁰ Those who stood between the King (lord paramount) and actual occupants (tenants in demesne) were called mesne lords, mesne meaning intermediate. M & W p. 13.

⁹¹ M & W p. 13.

heirs whether descendants or not were alive.⁹² Each of these interests was known as an estate indicating a duration in which the interest in land was held.⁹³

Since the land was vested in the Crown, the issue was what then did the tenant own?⁹⁴

The answer is provided by Prof. F. H. Lawson stating,⁹⁵

“The solution adopted by English law was to create an abstract entity called the estate in the land and to interpose it between the tenant and the land. Since the estate was an abstract entity imagined to serve certain purposes, it could be made to conform to a specification, and the essential parts of the specification were that the estate should represent the temporal aspect of the land...”.

The idea of an estate was to define the rights and interest accorded by the law to the tenant. In the *Walsingham case* the court clarified the distinction between the land and the estate. It was held:

“...the land itself is one thing and the estate in the land is another thing, for an estate in the land is a time in the land, or land for a time, and there are diversities of estates which are no more than diversities of time...”.

With the doctrine of estates, the law of property ceased to be earth bound. What the tenant or proprietor of the land owns is not strictly the land itself, but rather an estate or

⁹² M & W p. 13. See also *Walsingham's Case* 75 ER at 816f.

⁹³ See *Black's Law Dictionary*. p. 547.

⁹⁴ Gray & Symes, p. 45.

⁹⁵ Lawson, F. H. *Introduction to the Law of Property*. Oxford: Clarendon Press, 1958. pp. 66-67, quoted in Gray & Symes, p. 45.

interest in the land. The interest owned confers certain powers of management and disposition of the land according to the nature of the estate.

It is an elementary principle inherent in the notion of property law that no man can grant another any greater estate than that which he himself owns.⁹⁶ For instance, the owner of the entailed estate cannot give an estate in fee simple, he can only grant what he has and that is the entailed estate, or something less than he has. What these terms, that is tenure and estate, did was to clarify the ownership of land in the manner that the tenure answers the question upon what terms the land is held while the estate answers the question for how long.⁹⁷

The doctrine of tenure and estates is relevant in Tanzania. We have seen in part 3.2 above that all land in Tanzania is public land vested in the President as trustee on behalf of the citizens.⁹⁸ The President is the superior landlord. He controls the whole land and he is the only person who actually owns the land. The citizens occupying the land are doing so because they have either been granted by him the right to use and occupy the land in the form of a granted right of occupancy or are deemed to have been granted the right by him in the form of a customary right of occupancy.⁹⁹ In principle, what is granted is not the land itself, but an estate in the land, which is a duration of time upon which an individual can occupy and use the land.

⁹⁶ Gray & Symes, p. 46.

⁹⁷ Gray & Symes, p. 14.

⁹⁸ s. 4 (1) of the Land Act, 1999.

⁹⁹ s. 4 (5) of the Land Act, 1999 provides that all grants of the right of occupancy shall be made in the name of the President.

Both land tenure and estate are creatures of legislation. They are provided for under the Land Act, 1999 and the Village Land Act, 1999. The common tenure is the right of occupancy which is the right to occupy and use public land. As observed, the right may be a granted right of occupancy or a customary (deemed) right of occupancy. A granted right of occupancy is granted by the President¹⁰⁰ for a specific period of time,¹⁰¹ and at the end of the period of the right, the grantee may be entitled to a renewal.¹⁰² However, the granted right of occupancy is liable to revocation for good cause or in the public interest,¹⁰³ and compulsory acquisition by the state for public purposes.¹⁰⁴ On the other hand, a customary right of occupancy is the title of a Tanzanian citizen or a citizen of African descent using or occupying land under customary law.¹⁰⁵ A customary right of occupancy can also be granted to an individual or association by a village land council over a village land.¹⁰⁶ One of the distinct features of a customary right of occupancy is the fact that it can be granted for indefinite period.¹⁰⁷

The duration of time upon which an individual occupies the land is a property. In fact, the estate is what a person deals with in the land market because it is his. Section 4 (3) of the Land Act, 1999 provides to the effect that every lawful occupation of the land under a

¹⁰⁰ s. 22 (1) (a) of the Land Act, 1999.

¹⁰¹ The granted right of occupancy may be granted for the period up to but not exceeding 99 years, see s. 22 (1) (e), and s. 32 (1) and (2) of the Land Act, 1999.

¹⁰² s. 32 (3) of the Land Act, 1999.

¹⁰³ s. 22 (1) (j) and s. 49 of the Land Act, 1999.

¹⁰⁴ s. 22 (1) (k) of the Land Act, 1999.

¹⁰⁵ s. 2 of the Land Act, 1999.

¹⁰⁶ See s. 18 (1) (a) and (b) of the Village Land Act, 1999.

¹⁰⁷ s. 18 (1) (c) and s. 27 of the Village Land Act, 1999.

right of occupancy shall be deemed to be property. The tenure and estate are indicated in the certificate of occupancy issued to a holder of a right of occupancy.¹⁰⁸

3.4 Rights in land under customary law

Under customary law, the concept of land is usually associated with the literal understanding of land, that is, land as the physical surface of the earth. In Tanzania, probably the best way of understanding rights and interests attached to land under customary law is by investigating two issues. The first is the mode of land ownership under customary law. It answers the question, who can convey the land and on what terms? It is in fact an investigation of land tenure under customary law touching issues such as “from whom does an individual get land?” “On what terms?” “What can one do or not do with the land?”¹⁰⁹ The second issue is an investigation of what the term “land” includes or excludes. In other words, one attempts to investigate whether the common law maxim of *quicquid plantantur solo solo cedit* is a rule of customary law. It impacts on the extent of the bundle of rights conveyed as the land.

3.4.1 Forms of ownership of land in customary law

Two modes of ownership are possible under customary law, communal and individual modes. From the policy level, communal ownership was favoured at the expense of the individual form as the communal mode was seen to be capable to facilitate state control

¹⁰⁸ For an example of the Certificate of Occupancy, see pp. 57-61.

¹⁰⁹ See Bentsi-Enchil, K. “Do African System of Land Tenure Require a Special Terminology?” *Journal of African Law*. 1965, 9 (2), 114 -139; see J & F p. 5

of land matters particularly land disposition and speculation, the control of land fragmentation and accumulation and other forms of anti-social behaviour with land.¹¹⁰ The presumption was that land is owned by the community never by an individual and that an individual only has a security of tenure while using the land.¹¹¹

The favouring of communal ownership adopted a long established belief that the traditional African system of land tenure is communally based. The judiciary in several cases endorsed this view. In *Muhena bin Said v The Registrar of Titles and Another*,¹¹² a case involving land in Mwanza occupied by an Arab claiming a fee simple title under Mohammedan customary law, Graham Paul C. J. (Tanganyika) after rejecting the application of Mohammedan law stated:

“... The only material customary law affecting this land or rights to or over the land clearly was that of the aboriginal tribe and I am certainly not persuaded that this custom of the aboriginal tribe had any such conception as the ownership of land by an individual in fee simple freehold. Indeed I am satisfied that such a conception was entirely unknown to the aboriginal tribe”.

¹¹⁰ In a paper titled *National Property* presented by J. K. Nyerere then arguing against the suggestion to introduce the freehold he stated “Once you give land to a person to use as he would use his own house, then you can not prevent him from using it as he likes... If people are given land to use as their property, then they have the right to sell it. It will not be difficult to predict who, in fifty years time, will be the landlords and who the tenants. In a country such as this, where, generally speaking, the African are poor and foreigners are rich, it is quite possible that, within eighty or a hundred years, if the poor African were allowed to sell his land, all the land in Tanganyika would be owned by the wealthy immigrants, and the local people would be tenants”. Post-independent governments adopted this view. See Nyerere, J. K. *Freedom and Unity/Uhuru na Umaja*.p. 55.

¹¹¹ J & F p. 4.

¹¹² [1949] 16 EACA 79.

In fact Graham Paul C. J was referring only to the customary law of the Sukuma tribe. Gray C. J. (Zanzibar) added¹¹³ a general description of customary law stating that the land in question was situated in the territory of the Sukuma tribe within few miles of the headquarters of the then Chief of the tribe. He stated that the Arab occupants did settle peacefully in the land and were given the land by the chief or his representatives. The grantor could only give the grantee tenure recognised by the customary law of the tribe. He went on to state that:

“I do not propose to speculate as to what is the land tenure of the Sukuma tribe, but I am satisfied that the customary law of the tribe, like most of the African tribes in the interior of the continent, had no conception of freehold tenure such as is known to English law or analogous individual ownership known to Muslim law”.

Similar views of the nature of customary tenure in Tanzania were echoed by Sir Newman Worley V.P. in *Mtoro bin Mwamba v The Attorney General*¹¹⁴ where he stated that a title of the native holding land was that of a usufructuary interest allowing the holder to enjoy the land while in occupation. The court referred to the Privy Council decision in the case of *Amodu Tijani v The Secretary, Southern Nigeria*¹¹⁵ a case from Southern Nigeria in which the customary land law practice in former English colonies were discussed. It was stated that

“As a rule, in various systems of native jurisprudence throughout the Empire [i.e. British Empire], there is no such division between property and possession as English

¹¹³ See p. 81.

¹¹⁴ [1953] 20 EACA 108.

¹¹⁵ [1921] 2 AC 399 at 403.

lawyers are familiar with. A very usual form of native title is that of usufructuary right, which is a mere qualification of or a burden on the radical or final title of the Sovereign where that exists”.

Then, his lordship adopted Rayner C. J’s *Report on Land Tenure in West Africa* emphasising the dominance of the communal mode of land ownership in the traditional African context. The report went on to state:

“Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family”.¹¹⁶

Indeed, communal ownership is one form of ownership, but variation exists and changes are taking place. Individual ownership of land also exists.¹¹⁷ One way in which an

¹¹⁶ See p. 404.

¹¹⁷ J & F pp. 7-8 for the discussion on the debate of the traditional African mode of land ownership; see James pp. 67-75.

individual can acquire land under customary law is by allocation from the chief or head of the clan or family¹¹⁸ or allocation from the village council.

Normally once someone is allocated land either by the family or clan or village, it becomes difficult to dispossess that individual.¹¹⁹ The title becomes like an absolute title capable of excluding others from an active interference with the peaceful enjoyment of the land rights. The estate may be for a particular period of time or for an indefinite period.¹²⁰ Usually the landholder is capable of passing down the land to his heirs who may do the same. He may lease or permit another person to use the land with or without rewards. He may temporarily transfer the ownership of the land to a third party as a fulfilment of a term of a contract. He may distribute the land and transfer just a portion of the land or transfer crops or trees to a third party as part performance of contractual obligations.¹²¹ The landholder may pledge or mortgage his land to secure a loan to a third party.¹²² So long as the transactions in question do not result in an absolute alienation of the land from the family or clan, the landholder may deal with the land as he pleases.

¹¹⁸ Other ways in which an individual can acquire land under customary law includes clearing virgin forests, purchasing, and gift, planting permanent crops or effecting permanent improvements.

¹¹⁹ In *Amani Rajabu Njumla v Thomas Amri* [1990] TLR 58 (HC), it was held that the village government have no power to take away land from one person and give it to another.

¹²⁰ See s. 27 of the Village Land Act, 1999.

¹²¹ See *Hussein Jendasham v Tobias Kazinja s/o Kabunda*, App. to Governor No. 2/1948 reported in J & F p. 406.

¹²² Anyone who owns land can pledge it, however in some case the consent of the family or clan is necessary, see J & F p. 405. If consent was not obtained, any member of the family or clan can redeem the land by repaying the debt, see *Henrico s/o Welengalle v Felician s/o Kiraama* (1968) H.C.D 347 reported in J & F pp. 411-413. In customary pledge and mortgage, it is not necessary that the pledgee or mortgagee should take possession of the shamba. See *Emmanuel Paulo v Daudi Tibendelana* (1968) H.C.D 169.

However, the landholder holding family or clan land¹²³ may not readily sell his land to a stranger without the consent of the family or clan.¹²⁴ This is because by a sale of the land, it is alienated completely from the family or clan. In the event that land is sold without the said consent, any member of the family or clan can redeem the land after repaying the purchase price.¹²⁵ Indeed the sale is not an outright sale in the first place, but one which is reversible as it allows the possibility for the land to revert to the family or clan. The principle underlying the law is the protection of the family or clan as a unity.¹²⁶

The introduction of a limitation statute and the idea of long possession of land as a source of title in the customary domain prevent indefinite claims to land.¹²⁷ A suit to recover the land has to be instituted within twelve years otherwise the action is time barred.¹²⁸ In *Jibu*

¹²³ Clan land means a land which has been inherited successfully without the interruption from the great grandfather or from a grandfather by members of the same clan. See *Jibu Sakilu v Petro Miumbi* [1993] TLR 75 (HC). Also see J & F p. 427. The definition of family land may follow similar pattern.

¹²⁴ In *Leonance Mutalindwa v Mariadina Edward* [1986] TLR 120, Katiti J. at 124 observed that “In the perspective of things, it seems to me, that under customary law, obtaining in the area the case hails from, the parlance clan shamba, should mean, that title in clan land in that Customary law sense is generally vested in the clan. Since such title is so vested, the said clan may sanction individual clan mates to dispose of the clan land, or even for good cause, refuse to so sanction.” Also in *Reromino Athanase v Mukamulani Benedicto* [1983] TLR 370, the court overruled a sale in which no near relative was informed.

¹²⁵ See *Kamugisha Mazobe v Simon Gabagambi*, Digest No. 85 in J & F p. 429; *Maria Antonia Muhumuza Mugoye* (1954) 16/54 in J & F pp. 429-430.

¹²⁶ See *Aloyse Ishengeli v Lutainurwa*, Digest 84 in J & F p. 446, an unsuccessful action to redeem shamba sold to another clan member.

¹²⁷ See Kato, L. L. “Has Customary Law In English Speaking Africa Recognised Long Possession of Land as a Basis of Titles”. *East African Law Journal*. 1965, 1 (4), 243-259. In *Baya Mwaro v Mwangome* (1957) C. O. R. 6 in J & F p. 539 an action to recover the land instituted after thirteen years was held to be bad in law. In *Stephen s/o Sokoni v Milioni Sokoni* (1967) No. D/183/1963 in J & F p. 539 it was held that the respondent had occupied the *shamba* for such a long time that it would be unreasonable and unfair to allow the appellant to disturb him at this time. It went on to state if the appellant had really required the shamba he could not have kept quiet for more than thirty years.. Also see *Bi. Juliana Rwakatare v Kaganda* (1965) L. C. C. A. 43/1963, *Abed Shekulwavu v Salimu Juma* (1967) H. C. D 88.

¹²⁸ See Customary Law (Limitation of Proceedings) Rules, 1963, GN No. 311 of 1964. Section 2 of the Rules states “No proceedings for the enforcement of a claim under customary law of a nature shown in the second column of the Schedule hereto shall be instituted after the expiration of the period shown in the third column of that Schedule...”, then Item No. 6 provides “Proceedings to recover possession of land or money secured on mortgage of land - 12 years”. The Law of Limitation Act, 1971, Act No 10 of 1971 does not apply to land disputes under customary law.

Sakilu v Petro Miumbi,¹²⁹ the High Court relying on rule 2 of the Customary Law (Limitation of Proceedings) Rules¹³⁰ stated that an action to redeem the land couldn't be instituted after the expiry of twelve years. The twelve years time limit does apply to the redemption of pledged or mortgaged land under customary law.¹³¹

3.4.2 Transferable interest in land under customary law

In any dealing with land, the mortgagee or transferee of land will want to know what is being transferred to him. This is the position under customary law as well. The transferee of the land rights under customary law may want to know the bundle of land rights he is receiving probably by looking at the customary society understanding of the term land broadly. Many societies would regard things found in the land especially permanent crops such as fruits trees and permanent buildings as part of the land.¹³² The common term *shamba* refers to the land in its entirety.¹³³ In dealing with the land therefore, the land value takes into account the size of the land in terms of the surface of the earth, trees, permanent crops, buildings and permanent things if any found in the land.

¹²⁹ [1993] TLR 75.

¹³⁰ See *Evarister Martin v Apolinary Eustad and Tefunwa Tibishubwamu* (1968) H.C.D. 412, *Abel Rwebogoza v Raphael Mukaja* (1970) H.C.D n. 100, *Erizeus Rutakubwa v Jason Angero* [1983] TLR 365, *Yeromino Athanse v Mukamulani Benedicto* [1983] TLR 370. Note inconsistency in the limitation of time upon which an individual may institute suit to redeem the land. In *Leonance Mutalindwa v Mariadina Edward* [1986] TLR 120, Katiti J. held that the limitation period for an action for redemption or nullification of sale of clan land is three months. The same views are expressed in *Luttataza Biteya v Haji Abdul Sulemani* [1975] LRT no. 43, *Mzee Madrisa v Rwanturaki Mulagirwa* [1977] LRT no. 57.

¹³¹ *Malekela Mahita v Kibuwi Nzungwa* [1989] TLR 113 (HC). Also see Chapter Five, part 5.3.4 below for the discussion on the redemption of mortgaged or pledged land under customary law.

¹³² Seasonal crops and huts may not be regarded as part of the land.

¹³³ In *A. G. v Noti bin Ndugumbi and Other* (1954) 21 EACA 43 at 53, the term *shamba* was used to mean a piece of ground having an owner; a piece of ground which has been cultivated (in use) as opposed to bush and including the crop thereon.

Difficulties arise though when one wants to incorporate intangible rights as opposed to the concrete nature of land, in the overall meaning of land. I will hesitate to suggest that the common understanding of land under customary law knows the concept of intangible rights as understood in English common law as rights which may be legally enforceable.¹³⁴ However, even for land that may be regarded as individually owned, the right of exclusion of the general public from interference is not absolute. The land is always burdened by the peaceful use of others members of the society who may want to use the land in one way or another.

In many societies, a public right of way is recognised and enforceable. In this, existing old public ways used for fetching water, ways leading to grazing ground or farms, ways connecting villages or a fishermen's path to the lake etc can not unilaterally be closed or encroached upon unless the public agrees or actually stops using them.¹³⁵ Depending on the nature of each case, private arrangements giving someone the right of way may not be legally enforceable.¹³⁶ However, social life calls for the relaxation of strict rules. Walking over someone's land without his consent, something that would have probably amounted to trespass, is a common practice in some societies. There is an implied licence to walk through somebody's land provided you do not damage the crops.¹³⁷ In case of resistance from the landowner, land segmentations where land is fragmented into plots of one acre or less, offers an immediate alternative route. It is also expected that your

¹³⁴ Right such as right to light is inapplicable. It is difficult to imagine a situation resulting in a case over right to light.

¹³⁵ In *Dinah Mutahyabarwa v Rajab Adam* [1981] TLR 40 (HC), Lugakingira J. stated that under Haya customary law a public right of way (omuhanda) can not be closed unless the public so agrees or abandon its use.

¹³⁶ See *Ferdinand Jeremiah v John Mutalemwa* [1982] TLR 90.

¹³⁷ This is based from author's own experiences.

neighbour will not object to your digging a water stream across his land. These are burdens which land holders bear, probably not as legal burdens, but as moral duties based on mutual understanding in the society.

On occasion where land has passed into different hands from the developer, it is not uncommon for the improvement such as buildings and permanent trees to remain in the developer of the land while the land occupation has shifted to another person or reverted to the original holder.¹³⁸ In this, improvements are severed from the land. When land reverts to the original holder, the landholder gets the land short of the improvements effected on it.¹³⁹ He may allow another person to cultivate the land, he may pledge it, and he may deal with it as he pleases, but he is not allowed to compromise the interests of the owner of the improvements. The owner of the improvements at the same time may continue to benefit from the profits of his labour including transferring its control and use to another person.

This is a peculiar feature of customary land rights. It is a practice which makes the principle of *quicquid plantatur solo, solo cedit* redundant. Probably in view of this practice under customary law of disposing of the land short of improvement and vice versa, section 37 (8) of the Land Act, 1999 as amended by the Land (Amendment) Act, 2004 provides that under certain circumstance sale of land without unexhausted

¹³⁸ James, p. 39.

¹³⁹ See *Hussein Jendasham v Tobias Kazinja s/o Kabunda* App. to Governor No. 2/1948 reported in J & F p. 406.

improvement can be approved by the Commissioner for Lands.¹⁴⁰ The Land Act, 1999 has been used as a mere example since the disposition of a customary right of occupancy is regulated by customary law and not the Land Act.

3.5 Secured interests in land under the granted right of occupancy

As pointed out, the common land tenure is the right of occupancy which is the right to use and occupy the land. It can take the form of either a granted or a customary right of occupancy. This part focuses on the secured interest in land given under the granted right of occupancy.

The granted right of occupancy is not an absolute ownership of the land, but a form of ownership, which entitles the grantee to rights to occupy and use the land. It is a usufructuary right giving the grantee the rights to enjoy the fruits of the occupation. As has been observed above, the ultimate ownership is vested in the president as the paramount landlord.¹⁴¹ After acquiring a title to use and occupy public land, the issue is what interest does such an occupier own?

The holder of a granted right of occupancy has an interest in the land for a fixed period of time. The estate is for a certain period of time or for a time that can be made certain.¹⁴² Thus it is unlike the fee simple, an indefinite estate from the fact that no one can say at

¹⁴⁰ Also see s. 37 (9) of the Land Act, 1999 as amended by the Land (Amendment) Act, 2004. Note s. 37 (8) and (9) of the Land Act, 1999 (original text) which provided that no sale of land without unexhausted improvements shall be approved and that any disposition as aforementioned shall be void *ab initio*

¹⁴¹ Only the president owns the land, the subject can only occupy and use that land.

¹⁴² The time upon which an estate will come to an end is known.

any given time when it will come to an end or the life estate which is certain to come to an end, but of which the time of its termination is uncertain.¹⁴³ If nothing happens to trigger its revocation, the granted right of occupancy will come to an end exactly at the end of the duration of time over which it was granted. The time is indicated in the Certificate of Occupancy.

The time element in the granted right of occupancy is essential, since as already said, the occupier of the land occupies it for a specific period of time. In other words, what he owns is just the time in land not the land. In principle the time element in land is the one that is dealt with as security. It actually does not matter whether the occupier of the land actually owns the land or not as, if he has been granted a right to use the land for a specific period of time, the grant confers on him a legal legitimacy that the land is his throughout the period.

The estate in the land is a transferable interest which means the rights holder may dispose of the land by mortgage, lease or otherwise.¹⁴⁴ By mortgaging the land, the rights holder is disposing of part or all of his interest in the land. It is the principle that one cannot dispose of a greater term than what he has. For instance, the holder of a twenty-one years term cannot dispose of the land for twenty-five years, but can deal with it only for the period of twenty-one years.

¹⁴³ Lawson, p. 69.

¹⁴⁴ s. 22 (1) (i) of the Land Act, 1999.

A conveyance passes the land per se and rights and burdens attached to it. The disposition of an interest in land affects only the land itself and rights attached to it. The term land as used in the Land Act, 1999 “includes the surface of the earth and the earth below the surface and all the substances other than minerals and petroleum forming part of or below the surface, things naturally growing on the land, buildings and other structures permanently affixed to land”.¹⁴⁵ The definition is repeated *verbatim* in the Village Land Act, 1999.¹⁴⁶

Therefore, a conveyance passes the surface of the earth and the earth below the surface, things naturally growing on the land, buildings and fixtures. However minerals and petroleum are excluded from the general public ownership which means they cannot go with the land. The Mining Act, 1998¹⁴⁷ vests the entire minerals¹⁴⁸ property and control of minerals found on, in or under the land in the state.¹⁴⁹ The Act makes it an offence to prospect or conduct a mining operation in Tanzania without a licence.¹⁵⁰ Control of petroleum governed by the Petroleum (Conservation) Act, 1981 is vested in the government as well.¹⁵¹

¹⁴⁵ See the definition section of the Act.

¹⁴⁶ Act No. 5 of 1999, see the definition section of the Act.

¹⁴⁷ Act No. 5 of 1998 repealed Mining Ordinance (Cap 125), see s. 115 (1).

¹⁴⁸ Minerals are defined under (definition section) s. 4 (1) to mean “any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth, or in or under the seabed formed by or subject to a geological process, but does not include Petroleum or surface water”.

¹⁴⁹ s. 5 state that “subject to this Act the entire mineral property and control over mineral on, in or under the land to which this Act applies is vested in the United Republic.” For the purpose of this Act, the term land means, according to s. 4 (1), (a) Land in Tanzania, (including land beneath the territorial sea and other territorial waters) (b) the seabed and subsoil of the continental shelf.

¹⁵⁰ See s. 6.

¹⁵¹ Act No. 18 of 1981 replaced the Petroleum Ordinance (Cap 225). Petroleum is defined to include “crude petroleum and any liquid or gas made from crude petroleum, coal, schist, shale, peat or any produce of crude petroleum and includes condensate”, See Written Laws (Miscellaneous Amendments) Act, 2003, No. 11 of 2003 which amended s. 3 of Act No. 18 of 1981.

In addition, dealing in land does not affect water rights or rights over a foreshore because the right holder does not automatically acquire the aforementioned rights nor can he pass the right to mines or gas or rights to appropriate and remove for gain or research any flora or fauna naturally or present on the land or any palaeontological or archaeological remains found on the land.¹⁵² Dealing in land will affect these rights unless they were expressly granted to the grantee of the right of occupancy.

It can be noted that the Land Act, 1999 provides for corporeal hereditaments but does not specifically provide for incorporeal hereditaments in the definition of land. This can be contrasted with the pre Land Act, 1999 statutes, which provided for a broader meaning of land.¹⁵³ Notably, section 2 (ii) of the Conveyancing and Law of Property Act, 1881¹⁵⁴ defined land to include land of any tenure, and tenements and hereditaments, corporeal and incorporeal, and houses and other buildings, also undivided shares in land. Furthermore section 6 (i) provides that a conveyance will operate to convey with the land, all the buildings, erections, fixtures, commons hedges, and fences attached to the soil.

Furthermore the English Interpretation Act, 1889¹⁵⁵ under section 3 stated that the expression “land shall include messuages, tenements, and hereditaments, houses, and buildings of any tenure”. Unfortunately the Interpretation of Laws and General Clauses

¹⁵² See s. 22 (2) of the Land Act, 1999.

¹⁵³ The Land Ordinance (Cap 113) and The Land (Law of Property and Conveyancing) Ordinance (Cap. 114) did not contain a definition of land.

¹⁵⁴ 44 & 45 VICT. Conveyancing and Law of Property Act, 1881 was the statute of general application applicable in Tanzania.

¹⁵⁵ 52 & 53 VICT

Act, 1972 does not contain the definition of land.¹⁵⁶ In determining the rights and obligations that run with the land, one may rely on the fact that on the registration of certificates of occupancy, all covenants and conditions contained in the certificate of occupancy will be registered as well.¹⁵⁷ Furthermore, all subsisting mortgages or charges at the time of registration will be registered too.¹⁵⁸ In this way, on transfer of the land, all incumbrances registered or entered in the land register and any charge created over land pass with the land.

¹⁵⁶ See s. 4 of the Interpretation of Laws Act, 1996 for a definition of land.

¹⁵⁷ s. 28 of Cap 334.

¹⁵⁸ s. 29 of Cap 334.

CHAPTER FOUR

FORMS OF MORTGAGE BEFORE THE ENACTMENT OF THE LAND ACT, 1999

4.1 General remarks on mortgage

The last chapter provided an analysis of the general concept of security in land. Attention was paid to the investigation of interests in land which can be used as security. This chapter focuses on the forms of mortgage which could be created in Tanzania before the Land Act, 1999 came into force.

Before the Land Act, 1999 came into force in May 2001, there was no single piece of legislation which provided for the creation of mortgages or charges of land in the country. We relied on the English law. The law which was supposed to provide for dealing in property, that is the Land (Law of Property and Conveyancing) Ordinance (Cap. 114), did not proceed to provide for the manners of creating instruments of disposition. It simply applied in the country the law and practice of mortgage which were in force in England on the first day of January, 1922. The said English laws were to apply in the like manner as they applied in England.¹ As a result of this provision, the pre 1922 English law relating to mortgage became applicable in the country.

¹ s. 2 (1) of Cap. 114 states “subject to the provisions of this Ordinance, the law relating to real and personal property, mortgagor and mortgagee, landlord and tenant, and trusts and trustees in force in England on the first day of January, 1922 shall apply to real and personal property, mortgages, leases and tenancies, and trusts and trustees in the Territory in like manner as it applies to real and personal property,

The application of the English law and practice were subject to circumstances in the country.² This was important because of the different environment and reality on the ground under which these laws operate. It is apparent that when the English law of property was received in Tanzania, the form of mortgages at common law that is the conveyance of the legal estate with a proviso for re-conveyance by the mortgagee on repayment by the appointed date reflected the reality in the English legal tradition. Besides, the mortgage practice in England reflected the land tenure system under which a mortgagor held either the freehold or the leasehold in land. The Land Ordinance (Cap. 113) provided for a system of right of occupancy as a main form of land tenure in the country and that made it possible to have mortgages of rights of occupancy and leases, but not mortgages of freeholds.³ The difference in circumstances made it necessary to modify the English law to suit local circumstances.

Therefore, the discussion of the forms of mortgages in the country is based on the usage of the applicable English law of mortgages and the pronouncement of the courts on the relevant forms of mortgages applicable. Some of the forms of mortgages are deduced from other laws, such as the Land Registration Ordinance (Cap. 334) which provides for the registration of dealings in land.

Theoretically, the post 1922 English position on mortgages notably the changes brought in by the Law of Property Act, 1925 (England) and subsequent laws are irrelevant in the

mortgages, leases and tenancies, and trusts and trustees in England, and the English law and practice of conveyancing in force in England on the day aforesaid shall be in force in the Territory.”

² s. 2 (2) of Cap. 114.

³ A right of occupancy is similar to a lease.

country. However, the discussion of the both pre and post LPA 1925 position will lay the foundation upon which a study can be conducted on the practice of mortgages in the country. As will be demonstrated below some of the changes of 1925 were indeed adopted in the country.

Different forms of mortgages both in Tanzania and at common law have evolved over time. In general, they have been categorized as either legal or equitable mortgages. A legal mortgage arises where the mortgagor transfers to the mortgagee legal ownership or an interest (estate) in the property under the condition that the property shall be reconveyed or the estate transferred will automatically determine upon the performance of the condition on which it is given. On the other hand, an equitable mortgage may be created when the mortgagor fails to fulfil the condition necessary for the transfer of legal estate in creating a legal mortgage. If the contract to make a legal mortgage is specifically enforceable, equity regards it as an equitable mortgage. Similarly, an equitable mortgage may be created involving the transfer of an equitable interest in land.⁴

In *Swiss Bank Corporation v Lloyds Bank Ltd and Others*⁵ Buckley LJ contrasted the two forms of mortgage stating:

“The essence of any transaction by way of mortgage is that a debtor confers upon his creditor a proprietary interest in property of the debtor, or undertakes in a binding manner to do so, by the realization or appropriation of which the creditor can procure the discharge of the debtor’s liability to him, and that the proprietary

⁴ F & L pp. 5, 12. See *London County and Westminster Bank Limited v Tompkins* [1918] 1 KB 515 at 528.

⁵ [1982] AC 584 at 595.

interest is redeemable, or the obligation to create it is defeasible, in the event of the debtor discharging his liability. If there has been no legal transfer of proprietary interest but merely a binding undertaking to confer such an interest, that obligation, if specifically enforceable, will confer a proprietary interest in the matter in equity."

Initially, we will set forth the English position, especially the position before the enactment of the LPA 1925⁶ because the pre-1922 English position on the law and practice in property was applicable in the country.⁷ We will also highlight the influence of equity on the mortgage. The changes brought in by the LPA 1925 will also be discussed as this will help to identify the discrepancies in the law of mortgages in the country.

4.2 Mortgage at common law

The forms of mortgage capable of being created at common law have changed from time to time to suit the need of the time. Initially mortgage transactions were influenced by the usury laws which were against lending at interest or controlled the interest which could be charged. This prompted the need to craft the mortgage contract to avoid the laws. Then equity intervened and shaped the current mortgage transactions.

⁶ LPA 1925 came into force on 1st January 1926.

⁷ See Chapter Two, part 2.1.4.

4.2.1 Legal mortgage

The legal mortgage is basically a mortgage of the legal interest in land or property. The forms of legal mortgage depended on the nature of the title of the property holders, that is whether it was a freehold or leasehold title. Equity has played a decisive role in influencing the forms of mortgages. Also the changes in legal framework as a result of the enactment of new laws and change in practices caused by demand of time have shaped the forms of mortgages.

4.2.1.1 Mortgage of freehold

By the 15th century,⁸ the preferred form of mortgage was by way of conveyance of land in fee simple, subject to the condition that the mortgagor might re-enter and determine the mortgage if the debt was paid on the appointed date.⁹ However, the conditions were construed strictly in the sense that if the mortgagor was late even by a day in repaying the

⁸ As from the 13th century, at common law, mortgage transactions were shaped by the law against usury. Usury, described as an act of taking anything beside or above the money lent, was regarded by the church as contrary to natural justice. It was argued that the law of God did not allow lending of money at interest at all; the church was therefore to act against usury. See Jones, N. *God and the Moneylenders: Usury and Law in Early Modern England*. Basil Blackwell, 1989, pp. 47 – 48. Some of the Books in the Holy Christian Bible referred to were Exodus 22:25; Deuteronomy 23:20-1; Ezekiel 18:7-8, 13; Psalms 15:5 etc. However, with the enactment of usury statutes, the position was relaxed. Lending at interest was possible, but the laws fixed the maximum interest rate upon which the lender could charge for the loan advanced. For instance, the Usury Act 1571 (Henry VIII) forbade charging of the rate greater than 10 per cent, see Jones at pp. 47 – 65. These limitations setting the ceiling on the interest rate which could be charged resulted in the making of transactions which escaped usury laws, but still guaranteed sufficient profits to the lenders. The mortgagor would lease or assign his land to the mortgagee who went into possession for the length of the loan, disguising the agreement as a sale (false sale) with the possibility for the mortgagor of getting back the land. The practices were that either the income from the land was used to discharge the mortgage debt called *vivum vadium* (a live pledge) since the mortgage was self redeeming or the mortgagee kept the income, the act called *mortum vadium* (a dead pledge). The act of keeping the income from the land was not unlawful, but was regarded by a church as a sin. In both cases, if the money was not repaid by the time the lease expired, the mortgagee's interest was enlarged into a fee simple. See M & W p. 1171.

⁹ M & W p. 1171

debt, his interest in the land was extinguished and yet he remained liable for the debt.¹⁰ In the words of Littleton quoted in Cheshire and Burn:¹¹

“If the feoffment be made upon such condition, that if the feoffor pays to feoffee at a certain day etc. 40 pound of money, that then the feoffor may re-enter, etc, ...and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money is taken from him for ever, and so dead to him upon condition etc...”

Lord Haldane in *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd*¹² described the difficulties which were imposed on the mortgagor stating that:

“The case of the common law mortgage of land was indeed a gross one. The land was conveyed to the creditor upon condition that if the money he had advanced to the feoffor was repaid on a date and to a place named, the fee simple should revert in the latter, but that if the condition was not strictly and literally fulfilled he should lose the land for ever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feoffor notwithstanding that he had actually forfeited the land to his mortgagee.

However, in the 17th century, changes took place. Firstly, the mortgage took the form of a conveyance in legal fee simple with a covenant to reconvey the property if the money was repaid on the fixed date.¹³ This was the common form of mortgage before 1926. The

¹⁰ M & W p. 1172.

¹¹ See C & B pp. 659-660.

¹² [1914] AC 25 at 35.

¹³ M & W p. 1172.

important change was the intervention of equity. In addition to the mortgagee's powers to extinguish the mortgagor's interest in the land upon failure to repay the debt, traditionally, the mortgagee could enter into possession of the mortgaged property and appropriate the rents and profit accrued to him while in possession.¹⁴ Then equity, with the growth of the concept that a mortgage is nothing but a security for the money advanced, compelled the mortgagee to account for the benefits he accrued while in possession.¹⁵ Therefore, it was no longer advantageous for the mortgagee to enter into possession. Equity also gave the mortgagor the power to invoke his equitable rights to redeem the property after the contractual date.¹⁶ Thus, the new forms were that the mortgagor remained in possession and conveyed the fee simple to the mortgagee merely by way of security.¹⁷

The Law of Property Act, 1925 (LPA) brought in changes. Freeholds can no longer be mortgaged by a conveyance in fee simple. The only forms of legal mortgage which it is possible to create are now provided under section 85 (1) of the Law of Property Act, 1925. It states that a mortgage of an estate in fee simple shall only be capable of being effected at law either:

¹⁴ M & W p. 1172.

¹⁵ M & W p. 1172. See also James, R. W. *Land Tenure and Policy in Tanzania*. Nairobi: East African Literature Bureau, 1971, p. 307.

¹⁶ See part 4.3 below for the discussion of the role of equity on mortgage

¹⁷ The mortgagee could still enter into possession when he wanted to unless he precluded himself by contract from doing so. In *Four-Maids Ltd v Dudley Marshall Properties Ltd* [1957] Ch 317 at 320, Harman J. stated the rights of the mortgagee to enter into possession stating: "... the right of the mortgagee to possession in absence of some contract has nothing to do with default on the part of the mortgagor. The mortgagee may go into possession *before the ink is dry on the mortgage* unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right. He has the right because he has a legal term of the years in the property or its statutory equivalent. If there is an attornment clause, he must give notice. If there is a provision that, so long as certain payments are made, he will not go into possession, then he has contracted himself out of his rights. Apart from that, possession is a matter of course."

- by demise for a term of years absolute, subject to a provision for cesser on redemption, or
- by a charge by deed expressed to be by way of legal mortgage.

In the first form, the term of years granted is usually a long term, with a provision for cesser on redemption - a clause which provides that the granted term of years shall cease when the loan is repaid.¹⁸ If the mortgagor fails to repay the debt at the fixed date, the mortgagor has still an equitable right to redeem after the contractual date. However, this form of mortgage is not applicable in Tanzania.

Unlike the pre-1926 position, even after the mortgagor has parted with the property, he still remains the owner both in law and in equity. The mortgagor retains the legal fee simple in the land which means he can grant legal terms of years to subsequent mortgagees.¹⁹ The mortgages become only an incumbrance attached to the land.²⁰

The second form of creating mortgages is an alternative to the ordinary mortgage discussed above. It does not require the conveyance of the property to the mortgagee, but it is a charge which must be made by deed stating that the property has been charged by way of legal mortgage.²¹ As its name suggests, a charge by deed expressed to be by way

¹⁸ M & W p. 1175. See *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch. 441 at 461 and the House of Lord decisions in [1940] AC 613.

¹⁹ The mortgagor can create a legal mortgages in favour of two or more mortgagees by granting each mortgagee at least a day longer than the previous mortgage. See M & W p. 1176.

²⁰ M & W p. 1176.

²¹ M & W p. 1177.

of legal mortgage is in principle a charge which is employed to effect a mortgage transaction. It is not a surprise that section 87 (1) of the Law of Property Act, 1925 clarifies the position by stating that the mortgagee of the mortgage created by a charge by deed expressed to be by way of mortgage shall have the same protection, powers and remedies applicable to the first form of mortgage.

Theoretically, this form of mortgage is inapplicable in Tanzania, although the practice shows that the form is or was used to effect mortgages of land in the country.²² Thus this form of mortgage is relevant in Tanzania. As we have seen it is more a charge than a mortgage although it is regulated by the law of mortgages. As will be shown in Chapter Five, part 5.3.2 below the Land Act, 1999 introduced an informal mortgage which is a charge subjected to the law of mortgages.

4.2.1.2 Mortgage of leasehold

In case the mortgagor's interest in the property was not the fee simple, but leasehold, the leaseholder could create a mortgage by subleasing the property.²³ A discussion of mortgages of leaseholds is important in Tanzania because of the very fact that the right of occupancy which is the main form of land tenure in Tanzania resembles leasehold. With the right of occupancy, a system where the occupier holds the land for a specific period of time,²⁴ the common law mortgage of the leasehold especially the pre Law of Property

²² See p. 109 below.

²³ See *In re Sir Thomas Spencer Wells* [1933] Ch. 29.

²⁴ For the comparison between the right of occupancy and lease, see *Premchand Nathu & Co. Ltd v The Land Officer* [1962] EA 738 at 744.

Act, 1925 is relevant. We also have leasehold and therefore mortgages of leasehold. Before the enactment of the Law of Property Act, 1925, two methods of creating a legal mortgage of leasehold were as follows:

- Firstly, the mortgagor could sublease his term of years to the mortgagee for a term shorter than the remainder of the lease.

Since the sublease did not involve privity of estate between the mortgagee and the superior landlord, the mortgagee was not liable on covenants contained in the original lease, save as to negative covenants enforceable under the doctrine of *Tulk v Moxhay*.²⁵ In that case Lord Cottenham stated that a covenant not running with the land in law but being a negative covenant entered into by an owner of land with an adjoining owner, binds the land in equity and is enforceable against a derivative owner taking with notice.²⁶

- Secondly, the mortgagor could assign to the mortgagee the remainder of the term of the lease.

The mortgagee was bound by some of the covenants contained in the lease. The mortgagee became liable to covenants and conditions under the doctrine in *Spencer's*

²⁵ 2 PH 774; 41 ER 1143.

²⁶ At p. 1144. See C & B pp. 614-620. Also for the discussion of the rule in *Tulk v Moxhay*, see *London County Council v Allen* [1914] 3 KB 642 at 654.

case,²⁷ which concluded that the assignee of the lease is bound by the covenants which touch and concern the land. It was stated that:²⁸

“When the covenant extends to a thing in *esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee although he be not bound by express words.”

Then changes were brought in by the 1925 legislation. Section 86 (1) of the Law of Property Act, 1925 states that a mortgage of a term of years (lease) absolute shall only be capable of being effected at law either:

- by a subdemise for a term of years absolute, less by one day at least than the term vested in the mortgagor, and subject to a provision for a cesser on redemption, or
- by a charge by deed expressed to be by way of legal mortgage.

This means, it is no longer possible to assign the lease to the mortgagee as was the position before the enactment of 1925 Act. Cheshire and Burn gives a good example of how a mortgage by subdemise for a term of years absolute can be created.²⁹ If A, the owner in fee simple, has leased his land to T for 99 years, T (tenant and mortgagor) may mortgage the remainder of his tenancy, which is let us say 70 years to L (mortgagee) as a security for an advance. The law provides that T may sublet the premises to L for a

²⁷ 5 CO. REP. 16 a; 77 ER 72.

²⁸ At p. 74. See C & B p. 449.

²⁹ C & B p. 665.

period which must be less at least by a day than the term he himself holds. He will grant a sub-lease, for instance 69 years and 355 days, subject to a proviso that the title of L shall cease on the repayment of the loan by T. If T wants to secure money from S (second mortgagee) on the same premises, he must grant him another sub-lease for a period longer by one day than that of L. The same principle applies to subsequent sub-leases.³⁰

If L, the mortgagee wishes to take possession, he can do so, and can remain in possession until paid off either by T, the mortgagor or by S, the second mortgagee. If L, the mortgagee is paid off by T, the mortgagor, S, the subtenant possesses the same rights until he is paid by T, the mortgagor. If L, the mortgagee, is paid off by S, the subtenant (second mortgagee), S (second mortgagee) can take possession and hold it until the advance made both by L, the mortgagee and himself have been repaid.³¹

However, if L, the mortgagee decides to sell his interest,³² his conveyance to the purchaser will pass his mortgage term and the mortgagor term in the lease. This will have the effect of extinguishing the mortgage terms held by S, second mortgagee, and any later lender.³³

³⁰ In this situation, A becomes entitled to the reversion in fee simple; L is a sub-tenant for 69 years and 355 days; S subject to L's tenancy, is sub-tenant for 69 years and 356 days; T is the mortgagor, is the tenant for 70 years subject to the sub tenancies of L and S. See C & B p. 665.

³¹ C & B p. 666.

³² Under s. 89 (1) of LPA 1925, the mortgagee of the lease can sell his mortgage.

³³ C & B p. 666.

4.2.2 Equitable mortgage

An equitable mortgage as described by Buckley LJ in *Swiss Bank Corporation v Lloyds Bank Ltd*³⁴ “is created when the legal owner of the property constituting the security enters into some instrument or does some act which, though insufficient to confer a legal estate or title in the subject matter upon the mortgagee, nevertheless demonstrates a binding intention to create a security in favour of the mortgagee, or in other words evidences a contract to do so”. Before 1926, the mortgagor after creating a legal mortgage retained only an equitable interest in the property, so when he created a second mortgage in the same land the legal estate had been granted to the first mortgagee and therefore, the mortgagor conveyed to the second mortgagee his equity of redemption in the land.³⁵ Equitable mortgages could be created in the following ways.

4.2.2.1 Contract to create a legal mortgage

An equitable mortgage may arise where the owner of a legal estate in land executes an informal or imperfect charge over the estate or where the chargee fails to comply with the requirements provided by law.³⁶ If such a contract to mortgage is enforceable it will be regarded as a mortgage in equity.³⁷ Such a charge operates in equity upon the conscience

³⁴ [1982] AC 584 at 594.

³⁵ For the discussion of equity of redemption see part 4.3 below.

³⁶ G & G p. 598.

³⁷ In *Swiss Bank Corporation v Lloyds Bank Ltd* at 595, Buckley L.J. stated that “a contract to mortgage property, real or personal, will, normally at least, be specifically enforceable, for a mere claim of damages or repayment is obviously less valuable than a security in the debtor’s insolvency. If it is specifically enforceable, the obligation to confer the proprietary interest will give rise to an equitable charge upon the subject matter by way of mortgage.” Also in *United Bank of Kuwait v Sahib and Others* [1997] Ch 107 at

of the mortgagor.³⁸ In such circumstance, if the mortgage is enforceable equity looks on that as done which ought to be done and in accordance with the rules in *Walsh v Lonsdale*³⁹ treats the transaction as a valid equitable mortgage of the legal estate.⁴⁰

4.2.2.2 Deposit of title deeds (deposit of documents of title)

Under the old rule in *Russel v Russel*,⁴¹ a mortgage could be created through the mere deposit by the landowner of his title deeds or land certificates as the case may be.⁴² In this, other contractual formalities, such as the need for writing could be dispensed with, notwithstanding section 4 of the Statute of Frauds 1677.⁴³

At common law, a contract creates an equitable mortgage if specifically enforceable. But the Statute of Frauds and its successor, section 40 of LPA 1925 both require the contract to be in writing to be enforceable.⁴⁴ However, a doctrine of part performance disregarded the requirement of writing. In case of mortgage, deposit of title deeds constituted an act of part performance in which equity enforced the contract.⁴⁵ The deposit signified an

120, Chadwick J. stated “an equitable mortgage or charge may also arise out of specifically enforceable contract to create a security”.

³⁸ *Windella v Hughes* (1999) 9 BPR 17141 at 17143 quoted in G & G p. 599.

³⁹ [1882] Ch. D 9 at 15.

⁴⁰ *Parker v Housefield* 39 ER 1004; *Swiss Bank Corporation v Lloyds Bank Ltd* at 595D-F. The incomplete instrument is regarded in court of equity as evidence of an agreement to create a mortgage. See *Mestaer v Gillespie* [1803-13] All ER Rep 594 at 595F-G per Lord Eldon LC.

⁴¹ 28 ER 1121 at 1122.

⁴² s. 66 of LPA 1925. See G & G p. 601.

⁴³ See the Statute of Frauds 1677, 29 Car 2 c 3, s. 4 provided in effect that no action shall be brought against executors, etc, upon special promise, or upon an agreement, or contract for sale of lands, etc, unless agreement is in writing and signed.

⁴⁴ See also s. 53 (1) of LPA 1925.

⁴⁵ The doctrine of part performance was abolished with the enactment of s. 2 of the Law of Property (Miscellaneous Provisions) Act, 1989. Section 2 (8) abolished s. 40 of the LPA 1925, in which subsection

intention on the part of the depositor that the lender should hold the document as his security for a loan of money.⁴⁶

The current position is that the equitable mortgage can not be created only by an act of deposit of a title deed, a valid written contract of loan must accompany the deed. This is to comply with the stringent requirements of section 2 (1) of the Law of Property (Miscellaneous Provisions) Act, 1989 which in effect provided that a contract for a mortgage of or charge on any interest in land can only be made in writing.⁴⁷ Indeed in *United Bank of Kuwait PLC v Sahib and Others* it was held that the effect of section 2 of the Law of Property (Miscellaneous Provisions) Act, 1989 is, therefore, that a contract for a mortgage of or charge on any interest in land or in proceeds of sale of land can only be made in writing and only if the written documents incorporates all the terms which the parties have expressly agreed.⁴⁸

The interpretation of section 4 of the Statute of Frauds 1677 is relevant in Tanzania. The Statute of Frauds 1677 applies in Tanzania. The Law of Property (Miscellaneous Provisions) Act, 1989 does not apply, although the wording of section 2 helps to contrast the Tanzanian position in regards to the requirement of writing in contract.

(2) had preserved the law relating to part performance. For the discussion on the abolition of the doctrine of part performance, see *United Bank of Kuwait v Sahib and Others* [1997] Ch 107 at 135-136.

⁴⁶ This was the case in *In re Richardson* (1885) 30 Ch. D. 396, in which Fry LJ regarded a deposit of deeds to secure an overdraft without any memorandum of deposit as creating an equitable mortgagee. The same was in *Harrold v Plenty* [1901] 2 Ch. 314 and *Stubbs v Slater* [1910] 1 Ch. 632 at 639 in which a deposit of title deeds amounted to an agreement to execute a mortgage in equity. See also *Edge v Worthington* 29 ER 1133, *Ex p Montfort* 33 ER 653 at 653-654 per Lord Eldon LC. For more recent decisions see *Swiss Bank Corporation v Lloyds Bank Ltd* at 594H-595A referred to in *Thames Guaranty Ltd v Campbell* [1985] QB 210 at 218F; *United Bank of Kuwait Plc v Sahib and Others* at 137 per Peter Gibson LJ, 143E-H per Philips LJ.

⁴⁷ s. 2 (8) repealed s. 40 of the LPA 1925. See *United Bank of Kuwait PLC v Sahib and Others* at 137-139; G & G p. 602.

⁴⁸ At p. 136.

4.2.2.3 Mortgage of an equitable interest

An equitable interest in property may be dealt with to create an equitable mortgage. For instance, a beneficial interest under a trust in the land, or equity of redemption.⁴⁹ In *Casborne v Scarfe*,⁵⁰ Lord Hardwicke held that “an equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, ...the person therefore entitled to the equity of redemption is considered as the owner of the land, and a mortgagee in fee is considered as personal assets”. Such a mortgage is usually effected by the assignment of the whole equitable interest to the lender as a security for the money advanced under the condition for the full re-assignment on the payment of the loan.⁵¹

4.3 The influence of equity on mortgages

Equity is a body of rules or principles based on conscience. In its original application and still today, it intervenes to remedy the injustice of the law. Injustice could be occasioned by having a strict⁵² or rigid laws or laws with loopholes or one which does not provide an

⁴⁹ See part 4.3.1 below for the discussion on equity of redemption.

⁵⁰ 1 Atk. 603, 604 quoted with approval *In re Sir Thomas Spencer Wells* [1933] Ch 29 at 45 per Lord Hanworth M.R.

⁵¹ G & G p. 598. See also C & B p. 670.

⁵² See *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25. At p. 35 Lord Haldane gave an account of the injustice occasioned by the common law on mortgage transaction in which upon the failure by the mortgagor to redeem the mortgaged land on the date, he lost the land forever and still remain liable to pay the debt. This called for the intervention of equity.

appropriate remedy to the wronged party.⁵³ *Snell's Equity* put forward the role of equity in the following words:⁵⁴

“In origin at least, it (equity) represents the attempt of the English legal system to meet a problem which confronts all legal systems reaching a certain level of development. In order to ensure the smooth running of society it is necessary to formulate general rules which work well enough in the majority of cases. Sooner or later, however, cases arise in which, in some unforeseen set of facts, the general rules produce substantial unfairness. When this occurs, justice requires either an amendment of the rule or, if ... the rule is not freely changeable, a further rule or body of rules to mitigate the severity of the rules of law. This new body (or “equity”) is therefore distinguishable from the general body of law, not because it seeks to achieve a different end ..., nor because it relates to different subject-matter, but merely because it appears at a later stage of development.”

With this motive in sight, equity therefore created remedies which were fair remedies.⁵⁵

These remedies, such as specific performance of contract, the appointment of receiver or injunctions were available in addition to the available common law remedies.⁵⁶ It also

⁵³ Sir Nathan Wright in *Lord Dudley and Ward v Lady Dudley* (1705) Prec. Ch. 241 at 244 as quoted in *Snell's Equity*. 30th ed. 2000, p. 4 stated “Equity is not part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is a universal truth; it does also assist the law where it is defective and weak in the constitution... and defends the law from crafty evasions, delusions and new subtilties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless... Equity therefore does not destroy the law, nor create it, but assist it”.

⁵⁴ *Snell's Equity*. 30th ed. 2000, p. 4.

⁵⁵ *Westminster Bank Ltd v Edwards* [1942] AC 529 at 535; *Re Fitzhardinge's Lease* [1944] 2 All ER 145 at 148; *R v Minister of Housing and Local Government ex p. Finchely Borough Council* [1955] 1 WLR 7 at 31, 35.

⁵⁶ For Equitable Remedies, see *Snell's Equity*, 30th ed. 2000, Part VII.

provided a new procedure in the administration of justice.⁵⁷ More important in case of conflict between the law and equity, equity prevails which gave an assured an assistance of equity.⁵⁸ With these innovations, the rules of equity became very important in the administration of justice.

4.3.1 Equity of redemption

Probably the most important influence of equity on mortgages is the application of the equity of redemption. As shown above, the initial practice in mortgages was that the mortgagor could lose the mortgaged property if he fails to redeem it on the contractual date. In equity, it was inconceivable that the mortgagor should lose the mortgaged property simply by failing to repay the loan plus interest on the contractual date.⁵⁹ Initially equity intervened to give relief in case of accident, mistake or special hardship etc, but then relief was extended in all cases.⁶⁰ Time was not of the essence in the mortgage transaction and thus the mortgagee's position vis-à-vis the mortgaged property was only regarded as a security for the payment of money advanced. In *re Sir Thomas Spencer Wells*⁶¹ it was stated that "the position of a mortgagee of land whether freehold or leasehold is well established. In equity the right of the mortgagee is limited to the money secured and he holds that land only as security for his money, therefore although he has a legal estate in the land, yet in equity he has a mere charge for the amount due to him."

⁵⁷ *Snell's Equity*. 30th ed. 2000, p. 12. See also *Pugh v Health* (1882) 7 App. Cas. 235 at 237.

⁵⁸ s. 25 of the Judicature Act, 1873.

⁵⁹ *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at 35.

⁶⁰ *Salt v Marquess of Northampton* [1892] AC 1 at 19.

⁶¹ [1933] Ch 29 at 52.

In this equity compelled the mortgagee to regard the property as a security for the money advanced. As a result, the mortgagor was given an equitable right to redeem after the contractual date even when the mortgage contract vested an absolute title in the mortgagee upon failure by the mortgagor to pay the money on the specified date.⁶²

Thus the intervention of equity gave equitable rights to redeem to the mortgagor. An equitable right to redeem is a right conferred on the mortgagor to redeem the property at any time after the contractual date. It may be distinguished from the equity of redemption in that the former accrues after the contractual date while the latter arises as soon as the mortgage contract is made.⁶³ Equitable right to redeem is a particular right, while the equity of redemption is general. The equity of redemption is the sum total of the mortgagor's rights in the property including the equitable right to redeem.⁶⁴

The equity of redemption is an equitable interest in the property. In *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd*⁶⁵ Lord Parker gave a clear distinction between the two equitable rights and the role they play in safeguarding the interest of the mortgagor on mortgages. The practice was on paying the money on specified date, equity would compel the mortgagee to reconvey the property. However, when the mortgagor fails to pay the money on the date specified, the property conveyed becomes at law an absolute interest in the mortgagee. His Lordship proceeded stating:

⁶² M & W p. 1173. See *Salt v Marquess of Northampton* at 18.

⁶³ M & W p. 1174.

⁶⁴ M & W p. 1174.

⁶⁵ [1914] AC 25 at 47-48.

“Equity, however, did not treat time as of the essence of the transaction, and hence on failure to exercise what may be called the contractual right to redeem there arose an equity to redeem, notwithstanding the specified date had passed. Till this date had passed there was no equity to redeem,...The equity to redeem, which arises on failure to exercise the contractual right of redemption, must be carefully distinguished from the equitable estate, which from the first, remains in the mortgagor, and is sometimes referred to as an equity of redemption.”

Megarry and Wade described the position in the following words: “Although at law he (mortgagor) has parted with his land and has only a limited right to recover it, in equity he (mortgagor) is the owner of the land, though subject to the mortgage;⁶⁶ the mortgagee, on the other hand, is at law the owner but in equity a mere incumbrancer.”⁶⁷ Therefore, the equitable rights to redeem can not be clogged or fettered by any stipulation contained in the mortgage or entered into as part of the mortgage transaction.⁶⁸ Once the mortgagor has paid the principal sum, interest, and the costs, the interest shall be reconveyed and any stipulation which prevents reconveyance is null and void.⁶⁹

The only way in which a person could override the equitable right to redeem was by obtaining a decree of foreclosure. This was an order of the court instigated by the mortgagee’s application to extinguish the equitable right to redeem. This had the effect of

⁶⁶ *In re Sir Thomas Spencer Wells* at 52.

⁶⁷ M & W p. 1174

⁶⁸ *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd*. The maxims being “Once a mortgage always a mortgage” or “A mortgage can not be made irredeemable”. Also see *Samuel v Jarrah Timber and Wood Paving Corporation Limited* [1904] AC 323.

⁶⁹ See *Salt v The Marquess of Northampton* at 19; *Biggs v Hoddinott* [1898] 2 Ch. 307 at 322.

leaving the mortgagee with an absolute title to the property.⁷⁰ However, if the property was more valuable than the debt owed, the court would order a sale of the property out of which the mortgagee would receive the money due to him and the balance will devolve to the mortgagor.⁷¹

In itself, the equity of redemption is an interest which can be dealt with like any other property. It can be mortgaged, assigned or dealt with otherwise.⁷²

4.4 The forms of mortgages in Tanzania before the enactment of the Land Act, 1999

After the discussion on the forms of mortgage at the common law, we will now look at the forms of mortgage which existed in the country before the enactment of the Land Act, 1999. The forms of mortgage in Tanzania before 1999 were substantially influenced by the early English position particularly that prior to the Law of Property Act, 1925. The reason is that the repealed Land (Law of Property and Conveyancing) Ordinance (Cap. 114) made applicable, among others the law relating to real and personal property, mortgagor and mortgagee in force in England on the first day of January 1922.⁷³ It also adopted the English laws and conveyancing practice in force in England on the aforementioned date.⁷⁴

⁷⁰ M & W p. 1173.

⁷¹ M & W p. 1173.

⁷² See part 4.2.2.3 above.

⁷³ s. 2 (1) of Cap. 114.

⁷⁴ s. 2 (1) of Cap. 114.

As already stated, Cap. 114 had the effect of making the English law on mortgages in force in England by 1922 applicable in Tanzania. Notable is the application of the Conveyancing and Law of Property Act, 1881 (England) and other property laws. Cap. 114 in effect excluded from application in the country the Law of Property Act, 1925.

In practice, however, the post Law of Property Act, 1925 position was also referred to despite the fact that the LPA 1925 was inapplicable. Recent common law decisions restating the established mortgages principles rightly provided in the country an important guide on the law and practice of mortgages.

4.4.1 Mortgage of right of occupancy and lease

With the common land tenure being the right of occupancy, the forms of mortgage of a right of occupancy or lease resemble the mortgage of the leasehold under the common law discussed above. As pointed out already, the holder of the right of occupancy, like the lessee, holds the land for a specific period of time during which they may mortgage the land if they choose.⁷⁵

The registered mortgage of the legal estate can be created either:

⁷⁵ Note the comparison between the right of occupancy and lease in *Nitin Coffee Estates Ltd and 4 Others v United Engineering Works Ltd and Another* [1988] TLR 203 at 211 where the Court of Appeal stated that “A right of occupancy is something in the nature of a lease and a holder of a right of occupancy occupies the position of a sort of lessee vis-à-vis the superior landlord”. The statement was referred to by the full bench of the Court of Appeal in the case of *Abualy Alibhai Azizi v Bhatia Brothers Ltd* Misc. Appeal No. 1 of 1999 (Unreported) at pp. 13, 15. Also see *Premchand Nathu & Co. Ltd. v The Land Officer* [1962] 738 at 744 (PC).

- By assignment of the remaining term in the right of occupancy or lease; or
- By mortgaging a sub-term of the right of occupancy or lease.

In the first method, a mortgagor simply assigns the whole of his estate to the mortgagee. On the other hand, a mortgage of the sub term may be created by granting the mortgagee at least a day less than the mortgagor's term on the condition that the mortgage shall determine or the mortgagee shall surrender the sub-term when the debt is repaid.

The Land Registration Ordinance (Cap. 334) set forth a form of registered mortgage.⁷⁶ It does not create a new type of mortgage, but governs the formalities relating to the contract to mortgage or other transfer of registered estates or interests in land. It provided that a mortgage has to contain, among others the names of the parties, a description of the land to be mortgaged and the statements of mortgage. It is common to insert covenants in the mortgage deed. However, some covenants are implied in any mortgage. These covenants are set out under section 62 of Cap 334. The parties in a mortgage may style the mortgage to suit the circumstances of the case provided in substance the mortgage is not inconsistent with the statutory precedent set out in the First Schedule to Cap. 334.⁷⁷ For instance, the parties may agree on the definitions and interpretations of the terms for the purpose of their contract and other issues incidental to mortgage. The following is the form of mortgage as provided in the First Schedule to Cap. 334.

⁷⁶ An expression registered mortgages point to the fact that a mortgage of a registered estate or interest has to be registered to have legal force. See Chapter Five, part 5.6.3 for the requirement of registration of mortgages.

⁷⁷ See rule 7 of Land Registration Rules, GN No. 117 and 394 of 1954. Also s. 43 of Cap. 334.

Form of Mortgage (FORM L.R.11)

The Land Registration Ordinance (Cap. 334)

MORTGAGE OF A RIGHT OF OCCUPANCY

Title No...

I,
of.....

HEREBY MORTGAGE the right of occupancy registered under the above reference to
.....of to secure the sum of
shillings (Shs.....) with interest atper
centum per annum payable.

(Insert terms of payment and covenants additional to or in substitution for those implied by section 62 of
Cap. 334)

(Signature and attestation)

The mortgage of a lease could take the like form with the word “leasehold” being inserted instead of the “right of occupancy”.⁷⁸ However, unusual forms of mortgage existed. These were forms which in substance were inconsistent with the statutory form. In principle a form of mortgage is said to be inconsistent with the statutory form not when it adopts a verbal difference but among others, when it is calculated to give a legal consequence or effect either greater or smaller than that which would attach to it if drawn

⁷⁸ See FORM L.R. 12.

in the prescribed form, or when it is designed to mislead those whom it is the object of the law to protect.⁷⁹ James singled out “a charge by way of legal mortgage”.⁸⁰ This is a form of mortgage introduced in England by the Law of Property Act, 1925.⁸¹ By usage, a charge by way of legal mortgage became a possible form of mortgage. James argued such an unwarranted mortgage could only create either an equitable mortgage or an equitable charge and not a legal mortgage.⁸²

4.4.2 Equitable mortgage

An equitable mortgage may arise either because the mortgagee has not executed an instrument which is sufficient to transfer the legal estate, or because the mortgaged property is equitable,⁸³ or because the parties have decided to create an equitable mortgage. Equitable mortgages could be summarized as follows:

4.4.2.1 Agreement to create a legal mortgage

An equitable mortgage can be created by a defective legal mortgage. A defective legal mortgage is treated as an agreement to grant a legal mortgage, and if enforceable creates an equitable mortgage. The law requires that the mortgage must be in writing and

⁷⁹ *Woodward v Heseltine* [1891] 1 Ch. 469 at 472-4. See also *Ex parte Stanford* 17 Q. B.D. 259, 270; *Bird v Davey* [1891] 1 QB 29; *Capital and Counties Bank, Limited v Rhodes* [1903] 1 Ch. 631; James, R. W. *Land Tenure and Policy in Tanzania* p. 320.

⁸⁰ See James, p. 320.

⁸¹ See s. 87 of LPA.

⁸² The example and the arguments are entirely based on the work of James. This area needed further research, but unfortunately during field research, bankers were reluctant to provide enough mortgage deeds for our analysis.

⁸³ James, p. 310.

registered.⁸⁴ Furthermore, it is required that the consent of the Commissioner for Lands as to the transfer of the estate must be sought and obtained.⁸⁵ Once any of the conditions precedent in transfer of the legal estate or interest is unfulfilled, the transaction if enforceable results in an equitable mortgage.⁸⁶

In *Guaranty Discount Co v Credit Finance Ltd*,⁸⁷ it was held that the court will treat an ineffective legal mortgage as creating an equitable mortgage.⁸⁸ The applicable maxim is “equity regards as done that which ought to be done”. This has been the guiding position regarding the creation of an equitable mortgage.

4.4.2.2 Mortgage by deposit of certificate of title

As shown above, it was stated in *Russel v Russel*,⁸⁹ that a mortgage could be created through the mere deposit by the landowner of the title deeds. The deposit of document signified an intention on the part of the depositor that the lender should hold the document as his security for a loan of money, and constituted a sufficient act of part performance to create a mortgage.⁹⁰

⁸⁴ See s. 41 (1) (b), (2) of Cap. 334.

⁸⁵ For the discussion on the current position regarding the requirement of the consent of the Commissioner for Lands, see Chapter Five, part 5.6.2.

⁸⁶ Equity treats as done which ought to be done.

⁸⁷ [1963] EA 345.

⁸⁸ At pp. 350-351, per Newbold, J.A. at 361.

⁸⁹ 28 ER 1121 at 1122.

⁹⁰ See *In re Richardson* (1885) 30 Ch. D. 396; *Harrold v Plenty* [1901] 2 Ch. 314; *Stubbs v Slater* [1910] 1 Ch. 632 at 639; See also *Edge v Worthington* 29 ER 1133, *Ex p Montfort* 33 ER 653 at 653-654 per Lord Eldon LC. For more recent decisions, see *In Re Wallis & Simmonds (Builders) Ltd.* [1974] 1 W.L.R. 391 per Templeman J.; *United Bank of Kuwait Plc v Sahib* [1997] Ch 107 at 137 per Peter Gibson LJ, 143E-H per Philips LJ; *Swiss Bank Corporation v Lloyds Bank Ltd* [1982] AC 584 at 594H-595A referred to in *Thames Guaranty Ltd v Campbell* [1985] QB 210 at 218F.

This is the position in Tanzania. In *Guaranty Discount Co v Credit Finance Ltd* it was stated that where title deeds are handed over by a debtor to a creditor against the payment of money a very strong presumption arises that the deposit has been made with a view to the creation of an equitable mortgage over the entire interest of the debtor in the properties concerned and for the entire amount then due by the debtor to the creditor.⁹¹ The deposit of certificate of title with intent of creating a charge thereon is to be corroborated by evidence.⁹² Therefore, a deposit of title is normally accompanied by a memorandum of deposit charging the estate of the debtor.⁹³

The deposit of certificate of title as a way of charging the land to secure the payment of money could be deduced from the provision of the Land Registration Ordinance (Cap. 334). The Ordinance permits anyone with whom a certificate of title has been deposited with him as a charge for the money advanced to give a notice to the Registrar for land.⁹⁴ Section 64 of Cap 334 reads:

- (1) Any person with whom certificate of title has been deposited with the intention of creating a lien thereover may give to the Registrar notice in the

⁹¹ See p. 362 per Newbold J.A. Sir Trevor Gould, Ag. V.-P. stated at p. 356 that “A deposit of title deeds with intent to create a security will per se constitute an equitable mortgage”.

⁹² In *Chapman v Chapman* 13 BEAV. 308, 51 ER 119, the dangers of relying solely on the production or possession of the certificate of titles as evidencing the existence of mortgage were highlighted. The defendant submitted for the importance of proving that the deposit of title deed was made on the advance of money. He stated that “here nothing whatsoever is proved as to any deposit, but the plaintiff merely produces the deeds on the floor of the Court at the hearing, and ask the Court to assume that they were delivered to him as a security for an advance...If this be sufficient proof of mortgage, every landowner in the kingdom is liable to have his estate charged by the mere production by a stranger of the title of his estate, without any proof of how they have got into his possession”.

⁹³ The Land Registration Ordinance (Cap. 334) requires that any contract to create a mortgage should be in writing, s. 41 (1) (b) of Cap. 334. See Chapter Five, part 5.6.1 for the requirement of writing. This conditions means the deposit of the title deed should be accompanied by a memorandum of deposit. See also James, p. 312.

⁹⁴ Note s. 25 (3) of Land Registration Ordinance (Cap. 334).

prescribed form of such deposit and thereupon the Registrar shall enter the same in the land register as an incumbrance.

The following is a form of a notice of deposit of certificate of title as provided under the First Schedule to Cap. 334.

The Land Registration Ordinance (Cap. 334)

Notice of Deposit of Certificate of Title (Form L.R. 16)

(Section 64 (1))

Title No.....

I,
of.....

HEREBY GIVE NOTICE that the certificate of title to the estate registered under the above reference has been deposited with me with the intention of creating a lien there over.

Dated this.....day of

.....

Signature

4.4.2.3 Defect of form

As shown above, the Land Registration Ordinance provides a particular form which has to be observed before one can create a legal mortgage. To pass the legal title by way of mortgage, Cap. 334 requires that parties should use the proper form thereby providing, among others, description of the parties, the description of the mortgaged land etc. The Land Registration Ordinance provides for the manner in which deeds have to be executed.⁹⁵ In such case if the mortgage was not executed in the prescribed manner, or is defective in form, may results in an equitable mortgage once the intention of the parties to create a mortgage is established.

4.5 A comparison between mortgages and charges over land

The practice of mortgage of land has not been without difficulties. Apart from the difficulties of identifying the forms of mortgage, it is sometimes difficult to state in clear words whether a transaction created a mortgage at all or a mere charge over the property. The basic principles of mortgages and charges are similar in English law and in Tanzania. This discussion will base from that generalisation.

Differences in judicial opinions are apparent on mortgages.⁹⁶ The differences are not necessarily a result of lack of rules governing mortgage transactions, but probably arise

⁹⁵ See Part XIII (ss. 91 – 96) for Execution of Deeds

⁹⁶ See comments by Halsbury LC in *Noakes & Co. Ltd v Rice* [1902] AC 24 at 27.

from the appreciable difficulties of applying well established mortgage rules to different sets of facts.

The concepts mortgages and charges have been used loosely as if they refer to exactly the same thing.⁹⁷ In many cases, transactions were regarded as resulting in an equitable mortgage or equitable charges as meaning the same.⁹⁸ Indeed, in some enactments a mortgage has been stated to include any charge on any property for securing money or money's worth.⁹⁹

As already defined, a mortgage is a security created by contract whereby the creditor acquires interest in the property of the debtor. The interest has to be reconveyed to the debtor or automatically determine on payment of money or performance of some other obligations upon which the security is given.¹⁰⁰ On the other hand, a charge is a security whereby property is expressly or constructively made liable for the discharge of a debt or any other obligation.¹⁰¹

⁹⁷ Sometimes even an express contract to create a charge is presumed to be a contract to make a mortgage subjecting the contract to the rules of an equitable mortgage, see F & L p. 24. Also *Montagu v Earl of Sandwich* (1886) 32 Ch. D 525.

⁹⁸ In *Guaranty Discount Co v Credit Finance Ltd*, the term mortgage and charge have been used interchangeably. In *re Richardson* (1885) 30 Ch. D. 396 at 403 Fry LJ used expression equitable mortgage, equitable security and an equitable charges.

⁹⁹ See s. 2 (vi) of Conveyancing and Law of Property Act, 1881.

¹⁰⁰ F & L p. 4.

¹⁰¹ In *National Provincial and Union Bank of England v Charnley* [1924] 1 KB 431 at 449-450, Atkin L.J. described a charge stating ... there can be no doubt that where in a transaction for value both parties evince an intention that property, existing or future, shall be made available as security for the payment of the debt, and that the creditor shall have a right to have it made available, there is a charge, even though the present legal right which is contemplated can only be enforced at some future date, and though the creditor gets no legal right of property, either absolute or special, or any legal right of possession, but only gets a right to have security made available by an order of the court". A charge therefore does not pass either an absolute or a special property in the subject of the security, nor does it pass any right of possession, but merely confers on the creditor a right of realization by judicial process, see F & L p. 4, 22. Also *London County and Westminster Bank v Tompkins* [1918] 1 KB 515 at 528; *Swiss Bank Corporation v Lloyds Bank Ltd* at 595 per Buckley LJ.

The act of passing an interest in the land draws a line between mortgages and charges over land generally. While for a mortgage the mortgagor conveys his interest in the property to the mortgagee, for charges, it is unnecessary that a chargor convey his interest to the chargee. It is enough only if a particular land whether already in the chargor's possession or acquired afterwards is mentioned in the agreement as made liable.¹⁰² For instance, a chargor may indicate that he is charging his land to secure an overdraft etc.¹⁰³ If no land is mentioned, but the charge was given for value, the charge will attach to the chargor's land at the time of agreement.¹⁰⁴

One feature mortgages and charges have in common is that both have to be registered. As is discussed below,¹⁰⁵ mortgages of registered land are registered by virtue of the Land Registration Ordinance (Cap. 334) and, or Companies Ordinance (Cap. 212). Mortgages of unregistered land may be registered by virtue of Registration of Documents Ordinance (Cap. 117).¹⁰⁶ However, charges on land are not compulsorily registrable under the Cap. 117¹⁰⁷ because section 8 (2) (K) of Cap. 117 excludes from registration all documents relating to land.¹⁰⁸ Registration is optional under section 11 of the same Ordinance. It

¹⁰² F & L p. 24.

¹⁰³ In *Jones v Woodward* 116 L.T 378 quoted in *London County and Westminster Bank v Tompkins* at 526, a builder gave a charge on certain dwelling houses to secure all money due and to become due. It was held that such an agreement as did not convey the property out were only enforceable in equity.

¹⁰⁴ *Jones v Woodward case*.

¹⁰⁵ See Chapter Five, part 5.6.3.

¹⁰⁶ Charges to land are not compulsorily registrable under s. 9 of Cap. 117.

¹⁰⁷ See s. 9 of Cap. 117.

¹⁰⁸ See arguments on the effect of the foregoing sections in *Shinyanga Regional Trading Co Ltd and Another v National Bank of Commerce* [1997] TLR 78 at 88 – 89.

must be noted that charges created by a company must be registered under the Companies Ordinance (Cap. 212).¹⁰⁹

Mortgages and charges attract different consequences with mortgages attracting more extensive remedies than charges. Some of the remedies available to a chargee are sale and the appointment of a receiver. Significantly, in law, a chargee can not directly enforce these remedies, he must apply to the court for an order of sale or for the appointment of a receiver.¹¹⁰ Assistance of the court is necessary because charges (equitable charges) were regarded as equitable securities, securities made in an informal way which needs equitable assistance to enforce them and therefore they needed a court's control in their enforcement.¹¹¹

¹⁰⁹ See s. 79 of Cap. 212. In *re Yolland, Husson and Birkett* [1908] Ch. 152 at 158 quoted with approval in *National Provincial and Union Bank of England v Charnley* [1924] 1 KB 431 at 448, 452 (Atkin LJ), Cozens-Hardy M.R referring to s. 14 of the Companies Ordinance 1900 (England) similar to s. 79 of Cap. 212 stated that all charges created under the section have to be registered.

¹¹⁰ *Tennant v Trenchard* (1869) 4 Ch App. 537 at 542. Also *National Provincial and Union Bank of England v Charnley* [1924] 1 KB 431 at 450 per Atkin LJ. Under the Law of Property Act, 1925 if the charge is by deed, the chargee will have the statutory power of sale or appointment of receiver. See ss. 101 (1), 205 (1) (xvi) of LPA 1925.

¹¹¹ See *London County and Westminster Bank v Tompkins* [1918] 1 KB 515 at 530.

CHAPTER FIVE

MORTGAGE UNDER THE LAND ACT, 1999

5.1 Introduction

In this chapter, we will mainly focus on an investigation of the forms of mortgages capable of being created under the Land Act, 1999. We will also discuss how the Land Act affects other matters incidental to the creation of mortgages. The discussion in this chapter is an attempt to examine the impact of, among others, the Land Act, 1999 and subsequent amendments by the Land (Amendment) Act, 2004 on mortgages. We will begin by conducting an overview of the land law reforms in the country.

5.2 Land administration and land law reforms

Land law reform is the process of changing the land law by altering land relations to conform to certain goals. In Tanzania, the land law reform was in response to the nagging economic and social demands of the time, that is, the demand to have laws which will facilitate smooth dealings in land while at the same time protecting the interests of the users and occupiers of the land. The land law reforms in Tanzania were on both substantive and adjudicative law. As pointed above, for our purposes the important change was the enactment of the Land Act, 1999 and its 2004 amendment.

The enactment of the Land Act, 1999 and other laws was a continuation of the process of the land law reform which goes back to the colonial time. Both the German and British colonial administration passed laws aimed to alienate land from the native to the colonial settlers and control the ownership of and dealings in land. For instance the German Imperial Decree of 26th November 1895 declared all land in German East Africa as unowned and thereby vested in the German Empire.

The German rule was followed by the British rule of Tanganyika from 1919. In 1923, the British colonial administration enacted the Land Ordinance (Cap. 113) and Land (Law of Property and Conveyancing) Ordinance (Cap. 114). The Land Ordinance provided for land tenure and the overall administration of land in the country. It declared all land whether occupied or unoccupied to be public land¹ and vested the public land in the Governor.² On the other hand, Cap. 114 provided for the application of the English law and practice in property in the country.³

Dispositions of land were regulated by the Land Regulations 1960. In addition to that, the Land Registration Ordinance (Cap. 334) and Registration of Documents Ordinance (Cap. 117) were enacted to provide for the registration of dealings in land or other property. While Cap. 334 provided for the registration of land and matters appertaining to the title to land, Cap. 117 provided for the registration of documents. These enactments and other laws provided a guide in dealing in land.

¹ s. 3 (1) of Cap. 113.

² See s. 4. After independence the word “Governor” was replaced by “President”.

³ See s. 2 of Cap. 114.

In an attempt to address the problem of land tenure which would improve the standard of living of the people in East Africa, in the 1950s the colonial government launched the East Africa Royal Commission 1953-1955.⁴ One of its findings and recommendations was on the land tenure in the territory. The Royal Commission concluded that future policy concerning the land tenure and disposition should aim at individualization of land ownership. It was perceived that this would enhance mobility in the transfer of disposition of land for economic use.⁵ The Commission also recognised the need not to ignore the existing property rights in the territory. However, the recommendations of the Commission were not implemented by the independent government which took over in 1961. The individualization of land was seen as incapable of helping to achieve the national goals.⁶

The independence government opted for the policy of *Ujamaa* and declared the Arusha Declaration in 1967 to provide for a guide in building a socialist society. As a result, the legal system was overhauled to achieve this end.⁷ It included communalization of lands and creation of a strong state controlled economy.

⁴ East Africa Royal Commission 1953-1955 Report. London: Her Majesty's Stationery Office, 1955.

⁵ See p. 346.

⁶ See Chapter One, part 1.2.1, also see note 107 at p. 72.

⁷ The idea of *Ujamaa* was such that people spreading all over had to move to central established village where they would have easy access to social infrastructures. Citizens were required, and on some occasions forced to move to these villages. The villages were registered as cooperative societies. See Villages and *Ujamaa* Villages (Registration, Designation and Administration) Act, 1975, Act No. 21 of 1975. Act No. 21 of 1975 was repealed by Local Government (District Authority) Act, 1982, Act No. 7 of 1982. See also GN No. 451 of 1995.

The changes in the world economic order in the 1980s forced Tanzania to abandon its policy of Ujamaa and embrace a free market economy.⁸ Donors such as the World Bank and International Monetary Fund (IMF) pressed for good governance and market economy as a key to social and economic regeneration.⁹ Citizens and pressure groups called for the strengthening of the security of tenure of the users such as the farmers and pastoralists in a new economic environment.¹⁰ The government had to review its land law and policy and opt for law and policy which would minimize state control in land dealing and support a free market economy, and a law which would enhance greater participation of the private sector in creation of employment, generating income and general economic growth.

The reforms began with the appointment of the Presidential Commission of Inquiry into Land Matters on 3rd January 1991. One of its tasks was to review matters of policy/land laws which were in force concerning land allocations, land tenure, land use and land development and to recommend changes thereto. In 1992, the commission submitted its reports and concluded for the need of land law reform.

In 1995, the government came up with the National Land Policy 1995 which was adopted by the parliament in June 1995. The National Land Policy 1995 acknowledges a number of facts related to land. It acknowledged the changes in land use and the influence of the increase in human population and the pressure it exerted in demand for land especially in

⁸ See Chapter One, part 1.2.1 above.

⁹ "Making Law Work: restructuring land relations in Africa" in McAuslan, P. *Bringing the Law Back in: Essays in Land, Law and Development*, Ashgate, 2003 at 245, 249.

¹⁰ McAuslan, pp. 245, 249.

the urban centres.¹¹ It recognized the development of a land market in and around urban centres and the need for regulations to enable the government to capture gains brought by these changes.¹² It also recognized the competition for arable land as a result of the upsurge of investors wishing to acquire large pieces of land in various parts of the country for investment purposes.¹³ More important, the policy identifies the overall awareness among the citizens of the value of land and property (buildings) and the conflicts caused by this development.¹⁴

The National Land Policy 1995 provided a framework for the drafter of the Land Act, 1999¹⁵ and Village Land Act, 1999¹⁶. Indeed, section 3 of the Land Act, 1999 sets the fundamental principles of the National Land Policy.¹⁷ The Land Act, 1999 was enacted to provide for the basic law in land other than village land.¹⁸ It sought to fill a gap in the statutory regime because before its enactment the applicable laws especially the English laws were inaccessible to the majority of the people.

However, the dilemma in land law reform may well be observed in provisions of the Land Act, 1999. It is a dilemma common in an economically, socially diverse society like Tanzania. There is a substantial economic difference between the poor and the emerging rich, the urban and the rural, sex diversity with a majority of women still suppressed by customs and a generally male dominated society.

¹¹ See s. 1.1 (i).

¹² See s. 1.1 (ix).

¹³ See s. 1.1 (vii).

¹⁴ See s. 1.1 (viii), 4.2.17.

¹⁵ Act No. 4 of 1999.

¹⁶ Act No. 5 of 1999.

¹⁷ Part II of the Land Act, 1999. Also see s. 3 (Part II) of the Village Land Act, 1999.

¹⁸ See long title.

There are also substantial differences in the land views both under customary or traditional landholding and with respect to granted or modern landholding. Traditional ownership of land governed by customary laws, views land as part of social relations in the sense that, apart from being a source of livelihood, there is a special tie or sentimental attachment between the society and the land they occupy.¹⁹ However, urban dwellers occupying land under granted rights of occupancy increasingly view land as a commodity for economic advancement. To them the economic advancement is the key and not some social considerations.²⁰

These two approaches to land and disparities in the society posed a challenge on which land policy to adopt which ultimately affected the land laws. The Land Act, 1999 tries to strike a balance between the two, that is, while trying to facilitate the operation of the market, it also looks at protecting the interest of the users and occupiers of the land against the very market in land. In the process therefore, the Act was protective and employs the use of simple language to make it available to a wider section of the population. Instead of mortgagor and mortgagee, the terms borrower and lenders respectively were used. As shown below, this policy was later abandoned.

On the other hand, the Village Land Act, 1999 was enacted to provide for the management and administration of land in villages.²¹ It legislates some aspect of customary law and confirms its legitimacy and its application to customary land tenure. Important is the introduction of the system of registration of customary titles by granting

¹⁹ See McAuslan, p. 5.

²⁰ McAuslan, p. 5.

²¹ See long title.

Hati ya Ardhi ya Mila (a certificate of customary right of occupancy).²² This is an invention of the Village Land Act, 1999. A certificate of customary right of occupancy is a document which could be dealt with in the land market. One may wonder about the future of family or clan land once a family or clan member acquires *Hati ya Ardhi ya Mila* over the land. Granting certificates of title of customary rights of occupancy will make land occupied under customary tenure more available for economic purposes. However, the statutory intrusions of the Village Land Act, 1999 in customary land tenure will shake the traditional structure of land holding over which a large part of the land in the country is held.

As to adjudicative law, the Land Disputes Courts Act, 2002²³ was enacted to establish the land dispute settlement machinery. The Land Disputes Courts Act, 2002 which became operational by GN No. 223/03, established land courts that is, the Village Land Council, Ward Tribunal, District Land and Housing Tribunal, the High Court (Land Division) and finally appeals to the Court of Appeal of Tanzania.

Both the Land Act, 1999 and the Village Land Act, 1999 came into force on 1st May 2001.²⁴ Thereafter, regulations to provide for the better carrying into effect of the purpose and provisions of the Acts were published in May 2001.²⁵ But four years after the Land

²² See s. 25 (1) of the Village Land Act, 1999.

²³ Act No. 2 of 2002.

²⁴ GN Nos. 485 and 486 of 2000.

²⁵ They include The Land (Forms) Regulation 2001, GN No. 71 of 2001; The Land (Allocation Committees) Regulations 2001, GN No. 72 of 2001; The Land (Conduct of Auctions and Tenders) Regulations 2001, GN No. 73 of 2001; The Land (Disposition of Right of Occupancy) Regulations 2001, GN No. 74 of 2001; The Land (Small Mortgages) Regulations 2001, GN No. 75 of 2001; The Land (Functions of Authorised Officers) Regulations 2001, GN No. 76 of 2001; The Land (Conditions of the Right of Occupancy) Regulations 2001, GN No. 77 of 2001; The Land (Assessment of the Value of Land

Act, 1999 came into force, and even before it had become fully operational, different stake holders such as bankers under the umbrella of the Tanzania Bankers Association (TBA), NGOs and lawyers called for the repeal especially of the provisions of the Act on mortgages.²⁶ These calls led to the enactment of the Land (Amendment) Act, 2004,²⁷ which repealed and substituted Part X (Mortgages) of the Land Act, 1999 with a new one. The Land (Amendment) Act, 2004 came into force in October 2004 and is read as one with the Land Act, 1999. Therefore reference in this Chapter and subsequent Chapters to mortgages provisions (sections 111 to 142) unless stated otherwise, refers to the provisions of the Land Act, 1999 as amended by the Land (Amendment) Act, 2004.

5.2.1 The impact of the Land Act, 1999 on the law of property

The Land Act, 1999 has an enormous impact on the law and practice of property. Apart from the fact that it is the main source of law in the overall administration of land matters,²⁸ it names other laws which are to be applied in its implementation.²⁹

for Compensation) Regulations 2001, GN No. 78 of 2001; The Land (Compensation Claims) Regulations 2001, GN No. 79 of 2001; The Land (Ceilings on Land Occupancy) Regulations 2001, GN No. 80 of 2001; The Land (Composition and Procedures of the National Land Advisory Council) Regulations 2001, GN No. 81 of 2001; The Land (Management of the Land Compensation Fund) Regulations 2001, GN No. 82 of 2001; The Land (Fees) Regulations 2001, GN No. 83 of 2001; The Land (Fines) Regulations 2001, GN No. 84; The Land (Schemes of Regulation) Regulations 2001, GN No. 85 of 2001. See also Government Notice No. 86 of 2001 (The Village Land Regulations 2001).

²⁶ See NBC Ltd, Comments by NBC Limited on the Land Act No. 4 of 1999, November 2000; Tanzania Bankers Association, Submission of the Tanzania Bankers Association on Proposed Amendments to the Land Act (No. 4), 1999, April 2001; Tanganyika Law Society, Recommendations of the Tanganyika Law Society on the Land Act (No. 4) 1999, May 2001; Kibodya, F. G. The Land Act No. 4 1999: A Vehicle for Mortgage Finance in Tanzania (undated).

²⁷ Act No. 2 of 2004.

²⁸ s. 181.

²⁹ s. 180 (1) (a) and (b) mention customary laws of Tanzania, the substance of common law and doctrines of equity as applied from time to time in any countries of the common wealth which the court think they are relevant to the circumstances of Tanzania. See sources of law in Chapter Two.

The Land Act, 1999 repealed among others, the Land Ordinance (Cap. 113) and the Land (Law of Property and Conveyancing) Ordinance (Cap. 114).³⁰ However, it retains the Land Registration Ordinance (Cap. 334) and The Registration of Documents Ordinance (Cap. 117) as the laws governing the registration of land and matters relating to land.³¹

It restricted and expanded at the same time the application of English law, and opened up the possibility of borrowing some elements of foreign laws in its implementation and interpretation. In doing so, the Land Act, 1999 on one side has placed a cap on the statutes of general application by declaring that the statutes of general application in force in England on twenty second day of July 1920 which have not been declared by a court to be part of the law of Tanzania shall not be applicable in land matters after it came into force that is 1st May 2001.³² But on the other hand, it has allowed the possibility of applying the common law and doctrine of equity from other Commonwealth countries which appear to be relevant in the Tanzania circumstances. Initially, only the substance of common law and doctrines of equity in force in England on twenty second day of July 1920 were applicable,³³ but now the law allows the application of the substance of common law and doctrines of equity as applied from time to time in other Commonwealth countries.³⁴ This is a wide discretion which if properly used is going to benefit the Tanzanian common law and practice on property.

³⁰ s. 182 and schedule to the Act.

³¹ See ss. 29 and 30 etc.

³² s. 180 (2).

³³ Note that the 1st of January 1922 was the reception date for the application of the English law and practice in mortgage (property law and practice).

³⁴ s 180 (1) (b).

The Land Act, 1999 also allowed subsidiary legislation which existed before its enactment to continue.³⁵ Of significance is the Land Regulations 1960 as amended in 1960. The Land Act, 1999 provides further under section 184 (2) that the conditions contained in the Land Regulations 1948 were to apply unless they were specifically excluded or amended in a specific particular in relation to a specific granted right of occupancy, or are implied or expressly repealed or rendered of no effect by any of the provisions of the Act. Important is section 181 which regulates the application of other laws by stating that any provisions of any other law applicable to land which is in conflict or inconsistent with any of the provisions of the Act shall to the extent of that conflict or inconsistency cease to be applicable to land.

The Land Act also preserves the transactions which were effected before it came into force. It specifically states that any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the Act, shall continue to be governed by the law applicable to it immediately before the Act.³⁶

It must be noted that some of the changes were brought about by the 2004 amendments. In general the Land (Amendment) Act, 2004 repealed and substituted Part X (mortgage) of the Land Act with a new Part X. The new part X avoided irrelevancies.

The amended provisions have abandoned the plain language which was initially used by the Land Act, 1999. It has now employed specific terms. The Land Act, 1999 before the

³⁵ s. 184 (1).

³⁶ s. 183 (1). Also see subsection (2), (3) and (4).

2004 amendment used terms “borrower” and “lender” to signify mortgagor and mortgagee respectively. This use of expression resulted in difficulty especially where the borrower as the person who borrows was not the mortgagor that is the person who executed the mortgage. The amended provisions have rectified that difficulty by employing proper expressions – borrower, mortgagor, and mortgagee. The amended provisions have also added the definitions of mortgagor and mortgagee to supplement the definitions of borrower and lender which existed before the amendment.³⁷

As to forms of mortgages, the amended provisions have changed the forms of mortgages capable of being created in the country. As originally enacted, the Land Act, 1999 provided for the possibility of creating ordinary mortgages, small mortgages, customary mortgages, informal mortgages, and a form of mortgages referred to as lien by deposit of certificate of title. After the 2004 amendment, the creation of small mortgages is not specifically provided for in the Act.³⁸ In principle it is no longer possible to create a small mortgage, although in practice a small mortgage can be created where a small sum of money is involved.

But the amendment has also introduced or sanctioned the creation of a third party mortgage.³⁹ The other forms of mortgages such as ordinary mortgages, customary mortgages, informal mortgages and lien by deposit of certificate of title are retained. Also the amended provisions introduced a new section providing for the manner of creating

³⁷ See s. 112 (2) of the Land Act, 1999.

³⁸ s. 114 of the Land Act 1999 (original text); also see Land (Small Mortgages) Regulations, 2001, GN No 75 of 2001. Also note Form Nos. 42 and 43 of Land (Forms) Regulations, 2001, GN No. 71 of 2001.

³⁹ See part 5.3.5.

mortgages of the matrimonial home. As will be shown below, a new section cast light on some issues such as identification of a matrimonial home and consent of spouse(s) when the home is subjected to a mortgage.⁴⁰

The Land Act, 1999 also provides elaborate remedies to a mortgagee upon default by the mortgagor.⁴¹ As will be seen below, the enforcement provisions of the Land Act, 1999 before its amendment in 2004 created room for delays in the enforcement of the mortgage by the mortgagee, but the 2004 amendment has tried to simplify the enforcement procedures especially on contentious issues such as the length of notices.⁴² Once the mortgagee has served the mortgagor with a default notice, he may exercise the remedies without further delay. Despite the fact that the amendment was aimed at encouraging lending, the government was keen to ensure that the interests of those who give their land as security are protected, especially securities concerning domestic dwellings, agricultural land and pastoral land. The court will be central to the balance of the interests of the mortgagor and mortgagee.

5.3 Forms of mortgages under the Land Act, 1999

Unlike the Land (Law of Property and Conveyancing) Ordinance (Cap. 114), the Land Act, 1999 contains specific provisions for the creation of mortgages. In this part the discussion of the forms of mortgages capable of being created under the Land Act 1999 is based on a transaction where a borrower (mortgagor) whether a company or individual

⁴⁰ See part 5.4.

⁴¹ See Chapter Seven and Eight.

⁴² See Chapter Seven, part 7.2.

with a house or land secure bank financing by mortgaging that property as opposed to the practice of home purchases funded by a mortgage. The practice of home purchases funded by a mortgage is uncommon in Tanzania. A mortgage is defined in the Act as an interest in a right of occupancy or lease conveyed to secure the payment of money or performance of some other obligations. The forms of mortgages under the Land Act, 1999 range from ordinary (formal) mortgages to a form of mortgage referred to as a lien by deposit of documents. The Land Act, 1999 also provides for the creation of informal mortgages. The following are the forms of mortgages under the Land Act, 1999.

5.3.1 Ordinary mortgage

The ordinary (formal) mortgage is the main form of mortgage under the Land Act, 1999.⁴³ It is a form of mortgage which any occupier of land under a right of occupancy or lease can execute by mortgaging his interest in the land or a part thereof to secure the payment of a debt or some other obligations. This power is contained in section 113 (1) of the Land Act, 1999. The mortgage may be created by either:

- by assignment of the interest or estate in the right of occupancy or lease; or
- by transfer of a lesser interest or estate in the right of occupancy or lease.

⁴³ We call this form of mortgage as ordinary (formal) mortgage as no name is provided in the Land Act, 1999.

The former way may take the form of assignment of the whole estate in the land with the condition that the assignment shall determine or the estate be reconveyed upon the performance of the conditions on which the mortgage is given. The latter may take the forms of a transfer of a lesser estate (sub-lease) in the right of occupancy or lease. Since the amendment of 2002 section 113 (1) of the Land Act, 1999 reproduces its predecessor, that is the original section 112 (1), with slight changes. Before the amendment of the Land Act, 1999 section 112 (1) stipulated that a mortgage executed under this provision (s.112 (1)) had to use a prescribed form.⁴⁴ It meant that one had to adopt the Land Form No. 40 of the Land (Mortgage) Regulations, 2005⁴⁵ or Land Form No. 41 of the Land (Forms) Regulations, 2001.⁴⁶ Even then, one could modify the form to suit their circumstances.⁴⁷ But now the possibility to modify the form of mortgage to suit the requirement of the parties is inserted in section 113 (1).⁴⁸ The change is not material.

The power to create an ordinary mortgage includes the power to create third party mortgages⁴⁹ and second and subsequent mortgages.⁵⁰ However, the general power to create mortgages under section 113 is subject to prohibition or limitation imposed by the

⁴⁴ s. 112 (1) of the Land Act, 1999 (original text) provided that an occupier of land under a right of occupancy or a lessee may, by an instrument in the prescribed form, mortgage his interest in the land or a part thereof to secure the payment of an existing or a future or contingent debt or other money or money's worth or the fulfillment of a condition.

⁴⁵ The Land Form No. 40 contained in the Land (Mortgage) Regulations, 2005 (GN No 43 published on 12/5/2005) replaced Form No. 40 of the Land (Forms) Regulations, 2001.

⁴⁶ GN No. 71 of 4/5/2001.

⁴⁷ See regulation 5 of GN No.71 of 4/5/2001. See also s. 43 of Cap. 334.

⁴⁸ The only material difference between section 113 (1) of the Land Act, 1999 and section 112 (1) of the Land Act, 1999 (original text) is that section 113 (1) contains an expression "... , with such variations and additions, if any, as the circumstances may require ..." while section 112 (1) does not. The difference is not material. Section 113 (1) reads "an occupier of land under a right of occupancy and a lessee may, by an instrument in the prescribed form, *with such variations and additions, if any, as the circumstances may require*, mortgage his interest in the land or a part thereof to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition".

⁴⁹ See part 5.3.5 for the creation of third party mortgages.

⁵⁰ s. 113 (2) of the Land Act, 1999. See also Chapter Six, part 6.2.1.

Act or any other written law.⁵¹ In addition to that the power to create a mortgage under section 113 is subject to any restriction imposed on the conditions in the right of occupancy or lease and any condition contained in any incumbrance or burden already affecting the interest in land to be mortgaged.⁵² For this case, the mortgagor needs to be aware of restrictions if any contained in mortgage when he seeks to create a secondary mortgage.

5.3.2 Informal mortgage

Another form of mortgage capable of being created under the Land Act, 1999 is an informal mortgage. Section 113 (5) (a) provides that nothing in this section shall operate to prevent a borrower from offering and a lender from accepting a written and witnessed undertaking, the clear intention of which is to charge the borrower's land with the repayment of money or money's worth obtained from the lender.

An informal mortgage is in fact a charge which is employed to carry out a mortgage transaction. No special form is provided and that means the parties may devise a simple document, using simple and clear words charging the property for the payment of money.

⁵¹ s. 113 (3) (a) of the Land Act, 1999.

⁵² s. 113 (3) (b) of the Land Act, 1999.

5.3.3 Lien by deposit of documents

As shown in Chapter Four, part 4.4.2.2 above, before the enactment of the Land Act, 1999 the deposit of documents would result in the creation of an equitable mortgage.⁵³ Under the Land Act, 1999, an act of deposit of documents would convey a legal title in the property. This new form of mortgage is called a lien by deposit of document.⁵⁴ This form of mortgage accords with section 64 (1) of the Land Registration Ordinance (Cap. 334) which requires a depositor of a certificate of title with the intention to create a lien to give a notice to the Registrar of land of such deposit.⁵⁵

Section 113 (5) (b) of the Land Act, 1999 mentions documents which could be deposited to create a lien by deposit of document. It mentions:

- (i) a certificate of a granted right of occupancy;
- (ii) a certificate of a customary right of occupancy;
- (iii) a document of a lease;
- (iv) any other document which may be agreed upon evidencing a right to an interest in land; or
- (v) any other documents which may be agreed upon, to secure any payments.

It is not clear from the wording of section 113 (5) (b) whether a naked deposit of document would suffice to convey the legal title or the deposit has to be accompanied by

⁵³ Note s. 25 (3) of the Land Registration Ordinance (Cap. 334) which reads “where documents of title have prior to first registration been deposited with any person with intention of creation an equitable mortgage”

⁵⁴ s. 113 (6) of the Land Act, 1999.

⁵⁵ See Chapter Four, part 4.4.2.2.

a memorandum of deposit. However, we have seen in part 5.3.1 above that the mortgages created under section 113 of the Land Act, 1999 are subject to the prohibition and limitation imposed by the Act or any other written law. One of the prohibitions is contained under section 64 (1) (a) of the Land Act, 1999. It requires a contract for a mortgage to be in writing.⁵⁶ This suggests that a deposit of document should be accompanied by a memorandum of deposit charging the documents with the payment of money.

5.3.4 Customary mortgage

It has always been possible to create a customary mortgage in Tanzania. This customary practice is recognized and was allowed to continue by the Land Act, 1999. It is provided under section 115 (1) of the Land Act, 1999 that the creation and operation of customary mortgages of land shall continue to be in accordance with the customary law applicable to the land in respect of which the customary mortgage is created.

It is important to note that customary law is not uniform, and so neither are customary mortgages. The difference in customary laws and practices means rights and burdens imposed by customary mortgages will depend on the locality in which the mortgage transaction took place. However, these different forms of customary mortgages may have some common traits. As a result it is possible to assume that a particular established customary mortgage practice represents general customary mortgage practices in the country.

⁵⁶ See part 5.6.1 below.

A brief observation regarding mortgages under customary law will be in order particularly in respect of the rights of a third party or the community to redeem the mortgaged land. In some societies, if land held under rules of family tenure or clan control is mortgaged or pledged to a stranger without the consent of the family or clan, any member of the family or clan can redeem it by repaying the mortgage debt. The redeemer of the land does not become the owner of the land, but will be entitled to recover from the owner the money he has paid plus compensation for improvements effected on the land while he was in possession.⁵⁷ In such a situation, a mortgagor or pledgor may redeem the land from the clan member after paying the redemption price and compensation for the improvements effected in the land.⁵⁸ This right does not arise when an individual is the sole owner of the mortgaged land, but where the land is owned by the community.

However, if clan or family land is mortgaged subject to the proviso that it becomes the property of the creditor if the loan is not repaid by a fixed date, a relative who redeems the property becomes the absolute owner of the property.⁵⁹ The effect of the redemption by the clan or family member is to extinguish the interest of the mortgagor or pledgor in the land.⁶⁰

⁵⁷ See *Henrico s/o Welenggalle v Felecian s/o Karaama* (1968) H.C.D 347 in J & F pp. 411-413.

⁵⁸ See *Melishoni bin Maimbi v Mzee bin Kombo*, App. to Governor No. 117, in J & F pp. 409- 410, it is the case in which the plaintiff successfully claimed the land pledged to the defendants' ancestors for over a hundred years ago (three generations). The plaintiff was ordered to pay the redemption price plus the value of improvements in the land. See also *Leonard Karomba v Mustafa Buberwa* (1968) H.C.D 131 in J & F pp. 410-411.

⁵⁹ See *Martin Bikonyoro v Celestin Kaokola* (1968) H.C.D. 87.

⁶⁰ See *Didas Rwakalila and 3 Others v Thomas Matondane* [1992] TLR 314 at 317 (CAT), see also the High Court decisions in *Thomas Matondane v Didas Mwakalile & 3 Others* [1989] TLR 210.

The involvement of the third party is a peculiar feature of customary mortgage. But the customary mortgage develops and in the process it assumes some elements common in mainstream mortgages. This may create some difficulties. The Land Act, 1999 provides that in case of a lacuna in the customary law applying to a particular mortgage, and if no other system of customary law makes adequate or any provision for the matter, the relevant provisions of part X (mortgage) of the Act would apply.⁶¹

By referring only to part X of the Land Act, 1999 this may be unrealistic. This is because mortgage transactions are not governed only by part X of the Land Act, 1999 but also directly or indirectly provided for by other parts of the Act. For instance, Part VIII of the Act which is on disposition affecting land or provisions on co-occupancy. Therefore, there may be a need to open up the restriction to allow the use of any relevant provisions of the Land Act, 1999 and other laws to help customary law(s) in case of a lacuna.

5.3.5 Third party mortgage

A third party mortgage is a mortgage executed to secure a debt of another. In this form of mortgage there are three parties involved - the mortgagee (lender), the borrower and the mortgagor. The possibility of creating a third party mortgage is important because of some peculiar facts associated with borrowing and borrowers in Tanzania.

During the field research, it was pointed out to me that there is a huge demand for borrowing but there is a problem of the availability of suitable or acceptable securities.

⁶¹ See s. 115 (4).

Lenders accept different securities such as mortgages, debentures, guarantees, and pledge of shares. One form of securities preferred by lenders is the mortgage of land or other property. As for the mortgage of land, lenders accept lands or properties which have adequate and stable value. Acceptable properties should also be easily realizable.

In fact some of properties offered as security are located in areas where they are unrealizable. This is caused by the fact that a lot of properties are located in unserviced areas.

But having a suitable security alone does not guarantee a grant of a credit facility. A potential borrower must show evidence of their ability to repay the loan. Now the need to balance the demand for borrowing against the lack of suitable securities necessitated a third party mortgage. To a certain extent, a third party mortgage is a way of sharing good securities. The arrangement ensures that the borrower gets the credit facility he needs and the lender the suitable security he demands.

The Land Act, 1999, before it was amended in 2004 did not acknowledge the possibility of creating a third party mortgage. But now it starts by defining a third party mortgage to mean a mortgage which is created or subsists to secure the payment of a debt or the fulfilment of a condition by a person who is not the mortgagor, whether or not in conjunction with the mortgagor.⁶² Then section 113 (2) provides unequivocally that the

⁶² s. 112 (2). Also see a statement per Lord Parker of Waddington in *Kreglinger v New Patagonia Meat and Cold Storage Company Ltd* [1914] AC 25 at 47.

power to create a mortgage under subsection (1) of section 113 includes a power to create a third party mortgage.⁶³

A third party mortgage is executed in the same manner as an ordinary mortgage. The main exception is the fact that the mortgagor under a third party mortgage would not be under a direct obligation to repay the mortgage debt.⁶⁴ In this case section 62 (a) of the Land Registration Ordinance (Cap. 334) will not apply as it is superseded by section 124 (1) (a) of the Land Act, 1999.

As to whether the power to create a third party mortgage is limited only to a third party mortgage under subsection (1) of section 113 or extends to a third party informal mortgage or a third party lien by deposit of document is not clear. Section 113 (2) which the power to create a third party mortgage comes from refers only to section 113 (1), that is a provision which provides for the creation of an ordinary mortgages. In principle it should be possible to extend the application of section 113 (2) to cover creation of a third party mortgage of for instance an informal mortgage.

5.4 Mortgage of a matrimonial home

A mortgage of a matrimonial home is not a discrete form of mortgage, but rather a distinct mortgage created using a matrimonial home. It can be an ordinary mortgage or an

⁶³ See part 5.3.1 above for the creation of an ordinary mortgage. See also s. 112 (2) of the land Act, 1999 (original text).

⁶⁴ See s. 124 (1) (a) of the Land Act, 1999. See also s. 123 (1) (a) of the Land Act, 1999 (original text).

informal mortgage or a mortgage by deposit of document or a customary mortgage executed using a matrimonial home.

The law imposes conditions when a matrimonial home is subject to a mortgage. Before the 2004 amendment of the Land Act, 1999, conditions contained in subsection (3) of section 112, a section which provided for a power to create a mortgage. The 2004 amendment created a separate section. Section 114 (1) Land Act, 1999 requires the signature of the mortgagor and spouse or spouses of the mortgagor living in that matrimonial home for the mortgage to be valid. Alternatively, the provision requires evidence be furnished that the mortgagor and spouse or spouses living in the home have consented to the use of the home as security.⁶⁵ These conditions apply to customary mortgages too.

But discovering whether the house offered as a security is a matrimonial home that is, a building or part of building and adjacent land if any in which the husband and wife live together, is not easy.⁶⁶ This is contributed by the fact that most homes are registered in the names of the husbands who sometimes deal with homes without the knowledge of their wives. The law tried to take this reality into account. Polygamous marriage is common as well where one can find several wives living in the home. Living in the matrimonial home is a question of fact which involves the physical presence of the

⁶⁵ s. 114 (1) (a) and (b).

⁶⁶ s. 112 (2) of the Land Act, 1999 defines matrimonial home to mean the building or part of a building in which the husband and wife ordinarily reside together and includes- (a) where a building and its cartilage are occupied for residential purposes only, that cartilage and any outbuildings thereon; and (b) where a building is or occupied in conjunction with agricultural land or pastoral land, any land allocated by the husband or the wife, as the case may be to his or her spouse for her or his exclusive use.

spouse in the home. In that case the consent of a spouse, or spouses if more than one, must be sought and obtained. The responsibility is on the mortgagee to take steps to ascertain whether the home offered as a security is a matrimonial home, in other words, investigate whether the mortgagor has a spouse or spouses.⁶⁷

How could the mortgagee discover whether the home offered as security is a matrimonial home poses a problem. The law has not satisfactorily provided for this dilemma. In 2005, the Land (Mortgage) Regulations, 2005⁶⁸ were published. The regulations contained among others, steps that must be taken to discover whether the applicant is married or not and if he or she is married, the manners of obtaining the consent of the other spouse. The regulations are elaborate but both with section 114 of the Land Act, 1999 will not solve the difficulty of identifying whether a home is matrimonial home or not. This is a problem which can not be solved by tightening the law but rather by raising the awareness in the society of the importance of registering interests in the properties.⁶⁹ As long as homes are registered in the name of husband, the validity of mortgage of matrimonial home will always be called into question. The regulations will simply protect lenders against a possible action by an excluded spouse in the future. In other words, the regulations might leave the excluded spouses more vulnerable because if lenders conduct themselves in accordance with section 114 of the Land Act, 1999 and the regulations a spouse challenging the validity of the mortgage would have little chance of succeeding.

⁶⁷ s. 114 (2) of the Land Act, 1999.

⁶⁸ GN No 43 published on 12/5/2005.

⁶⁹ See the conclusion for comment.

The regulations require the applicant to sign a form stating that he or she is not married and, if he or she is married, it requires the applicant to disclose the name and address of the spouse.⁷⁰ The steps won't guarantee the discovery of the matrimonial status of the applicant, but will only act as a proof that the mortgagee did take steps to discover whether the applicant was married or not. The publication of the regulations should go hand in hand with two things: firstly raising the awareness of the general public especially the wives to have their interest registered in the relevant register if not registered, and secondary, enhancement of the system of registration of titles.⁷¹ If the two requirements are met, searching in the register would be the sure way of discovering whether the home offered as a security is a matrimonial home.

These rather stringent requirements are necessary. They are results of a fear originating from the historical and traditional position in which title in matrimonial home vested absolutely in the husband who could deal with the home on behalf of the other spouse.⁷² The requirements underscore the need of the law to protect vulnerable parties, in most case wives, against dealings in the matrimonial home by their husbands without their knowledge or consent. The possibility of the husband abusing his strong position to the prejudice of his wife is what the law seeks to control. The law needs to strike a balance making sure that the matrimonial homes remain available as security without prejudicing the interest of weaker parties residing matrimonial homes.

⁷⁰ Regulations 4 (1) (a) and (b) of the Land (Mortgage) Regulations, 2005.

⁷¹ See Chapter 8, part 8.9.1 below.

⁷² The old position at common law was rested upon the fundamental doctrine of unity by which spouses were regarded as one person in law. In general, the whole of a woman's property vested absolutely in the husband when she married. See *Cottliffe v Edelstone* [1930] 2 KB 378; *Johnson v Clark* [1908] 1 Ch. 303. Also see Hadley, N. M. *Ownership of Matrimonial Property in England*. Ph. D thesis, University of Birmingham, 1978, pp. 3-5.

In addition, the rules regarding co-occupancy (co-ownership) whether joint occupancy or occupancy in common apply in regard to dealing in a matrimonial home.⁷³ Joint occupancy (joint tenancy) arises if the matrimonial home is jointly owned by the spouses, and the parties have acquired the property at the same time, and have the same interests in the right of occupancy or lease as the case may be.⁷⁴ On the other hand, occupancy in common arises where occupiers hold undivided shares in the property which has not been divided among the occupiers.⁷⁵ For instance where the land is registered in the name of one spouse and later the other spouse acquires an interest in the property by contributing to its improvements, developments or general upkeep, the spouse who contributes to the matrimonial home is entitled to an interest in the property in the nature of the occupancy in common.⁷⁶

Parties in joint occupancy, although they have as between themselves separate rights in the property, are as against everyone else in the position of a single owner. In this regard, dealing in the property by a joint occupier would be void. Section 159 of the Land Act, 1999 states:

(4) Where the land is occupied jointly under a right of occupancy or lease no occupier is entitled to any separate share in the land and consequently-

(a) disposition may be made only by all the joint occupiers;

⁷³ s. 159 (1) defines co-occupancy as the occupation of land held for a right of occupancy or a lease by two or more undivided shares and may be either joint occupancy or occupancy in common; see also M & W p. 475.

⁷⁴ See M & W pp. 475 – 480.

⁷⁵ See M & W p. 480; *Re King's Theatre, Sunderland* [1929] 1 Ch. 483.

⁷⁶ See s. 161 (1) and (2) of the Land Act, 1999.

(c) a joint occupier may transfer his interest inter vivos to all the other occupiers but to no other person, and any attempt to so transfer his interest to any other person shall be void.

*Zakaria Barie Bura v Theresa Maria John Mubiru*⁷⁷ was a case involving a house jointly owned by the spouses. In an action by the wife for a declaration that the sale of the house by the husband without her consent was void, the court held that the husband had no power to sell the house because it was jointly owned by the two spouses.⁷⁸ Similarly in *Mtumwa Rashid v Abdallah Iddi and Salum Omari*⁷⁹ the Court of Appeal held the sale of a matrimonial home jointly owned without the knowledge and consent of the other spouse void.⁸⁰

5.4.1 Mortgage by severance of interest in the matrimonial home

For this purpose, severance of interest in the matrimonial home is used to describe the process in which a spouse deals with his or her interest in the house without the consent of the other. It is doubtful whether a spouse by severing his interest in the matrimonial home can deal with his or her interest in the house without infringing the conditions laid down under section 114 (1) of the Land Act, 1999 or section 159 (4) of the same Act.

⁷⁷ [1995] TLR 211.

⁷⁸ See p. 215.

⁷⁹ Civil Appeal No. 22 of 1993 (Unreported).

⁸⁰ See pp. 6 - 7.

In *Thames Guaranty Ltd v Campbell and Others*,⁸¹ a husband and wife jointly purchased a home but before registration of the transfer to them as joint tenants was complete the plaintiff company agreed with the husband by letter to grant him a loan secured on a charge of the land. The wife did not consent to the charging of the property and at the time of the agreement the company did not know and could not have known that the transfer of the property was to be to the husband and wife as joint tenants. The court stated the law regarding severance of the beneficial interest by the husband stating:⁸²

“Mr Campbell (husband) did have power, without the wife’s concurrence, to sever the beneficial joint tenancy in the property and to dispose of his severed beneficial interest in such manner as he thought fit.”

This decision suggests that a party can deal with his beneficial interest in the property. He can assign his interest or otherwise and such action would amount to a sufficient act to sever the joint tenancy. The court went on to refer to an equitable doctrine stating:⁸³

“It is a well-established principle of equity that where, in the course of concluding a contract, a person has represented that he can grant a certain property, or is entitled to a certain interest in that property, and it later appears that there is deficiency in his title or interest, the other party can obtain an order compelling him to grant what he has got and, in an appropriate case, to submit to reduction of consideration for the grant”.⁸⁴ The doctrine of partial performance will relieve an innocent person who gives consideration for the promise of the charge on the

⁸¹ [1985] QB 210.

⁸² See p. 234G.

⁸³ See p. 235B.

⁸⁴ See *Fry on Specific Performance*, 6th ed, 1921, paras 1257 – 1258 quoted in *Thames Guaranty Ltd v Campbell* [1985] QB 210 at 235.

property by compelling the promisor to make good his promise by severing his beneficial interest in the property.

However, the application of the doctrine of partial performance is applicable in this regard subject to the interest of the other joint tenant who may suffer irrevocable harm or endure exceptional hardship if the promise by one joint tenant is enforced.⁸⁵ It is therefore relevant if a party challenging the mortgage of the matrimonial property can show that he or she actually lives in the matrimonial home in which case an order which would have the effect of alienating him or her from the property would be undesirable. The court needs to weigh the conflicting legal and moral claims of the creditors on one hand and those of the wife on the other, taking into account all relevant facts including the existence of children.⁸⁶

One may argue regarding a disposition of a right of occupancy or any certificate of title by a spouse to the prejudice of the other spouse by relying on the rules on trust. For instance one of the High Court observations per Mann J in *Thames Guaranty Ltd v Campbell and Others*⁸⁷ was that joint owners of a legal estate are jointly entitled to the custody of the title deeds relating to that estate. Referring to *Halsbury's Laws of England* 4th ed., vol 39 (1982), para. 388, the court held the two are the trustees of the deeds no less than they are of the legal estate. Trustees can act only with unanimity. One can not

⁸⁵ See p. 235H. See also *Cedar Holdings Ltd v Green* [1979] 3 All ER 117, [1981] Ch 129.

⁸⁶ See *Holliday (A Bankrupt), In re, Ex parte Trustee of the Property of the Bankrupt v Holliday* [1980] 3 All ER 385, [1981] Ch 405. See also *Turner (A Bankrupt), In re Ex parte Trustee in the Property of Bankrupt v Turner* [1974] 1 WLR 1556, [1975] 1 All ER 5; *Bailey (A Bankrupt), In re* [1977] 1 WLR 278, [1977] 2 All ER 26.

⁸⁷ See p. 222.

part with the custody of the deeds without the consent of the other. That custody is not a thing which either can by himself effectively surrender for the purpose of dealing with his own beneficial interest.

An interesting situation arises in dealing with the land or matrimonial home or a certificate of right of occupancy registered in the name of one spouse, in most cases the husband as the sole proprietor. In the course of life, the wife may contribute towards its improvement and hence acquire a beneficial interest in the property in the nature of occupancy in common (tenant in common).

Section 161 of the Land Act, 1999 states:

- (1) Where a spouse obtains land under a right of occupancy for the co-occupation and use of both spouses or where there is more than one wife, [all spouses,] there shall be a presumption that, unless a provision in the certificate of occupancy or certificate in customary occupancy clearly states that one spouse is taking the right of occupancy in his or her own name only or that the spouses are taking the land as occupiers in common, the spouses will hold the land as occupiers in common and, unless the presumption is rebutted in the manner stated in this subsection, the Registrar shall register the spouses as occupiers in common
- (2) Where land held for a right of occupancy is held in the name of one spouse only but the other spouse or spouses contributed by their upkeep and improvement of the land, that spouse or those spouses shall be deemed by

virtue of that labour to have acquired an interest in that land in the nature of an occupancy in common of that land with the spouse in whose name the certificate of occupancy has been registered.

The section above sums up the position of the law. It is further provided in the Land Act, 1999 in case of a mortgage of the property registered in the name of one spouse when the other spouse acquired an interest in that property, that there is a duty imposed on the lender under paragraph (a) of subsection (3) of section 161 to satisfy themselves that the other spouse consented to that mortgage.⁸⁸

Williams & Glyn's Bank v Boland,⁸⁹ was a case involving an action for possession of certain registered land on which a matrimonial home stood and which was registered in the name of a married husband as a sole proprietor. His wife had contributed a substantial sum of her own money towards its purchase or towards paying off a mortgage on it thus becoming an equitable tenant in common to the extent of her contribution. The husband mortgaged the houses by legal mortgage to the appellant bank, which made no inquiries of the wife. The House of Lords had to decide whether a husband or a wife who has a beneficial interest in the matrimonial home, by virtue of having contributed to its purchase price, but whose spouse is the legal and registered owner, has an overriding interest binding on a mortgagee who claims possession of the matrimonial home under a

⁸⁸ See also s. 59 (1) and (2) of the Law of Marriage Act, 1971.

⁸⁹ [1981] AC 487, Lord Wilberforce decided that *Cedar Holdings Ltd v Green* [1979] 3 All ER 117, [1981] Ch 129 was wrongly decided.

mortgage granted by that spouse alone.⁹⁰ It was held in the affirmative and thus an action for possession of the matrimonial home could not succeed.

The court relied on section 70 (1) (g) of the Land Registration Act, 1925 (England) which provides to the effect that all registered land shall be deemed to be subject to the interest of every person in actual occupation of the land.⁹¹ The Land Registration Act, 1925 (England) does not apply in Tanzania. However, as shown above section 161 (3) (a) of the Land Act, 1999 imposes a duty on the mortgagee to satisfy themselves that the other spouse has consented to the disposition of the matrimonial home. The interest of the wife will be not be impeached by dealings in the property by the husband without her consent.

5.4.2 Mortgage of matrimonial home entered into as a result of undue influence or misrepresentation

It is important to consider the position of the law in the event of a challenge by the wife to an attempt by the bank or any other creditors to enforce the mortgage or charge over a matrimonial home jointly owned by the parties. In this regard, the wife may pray for the court's assistance pleading undue influence of the husband or misrepresentation of the full implication of the transaction by the husband.

⁹⁰ *Williams & Glyn's Bank v Boland* [1981] AC 487 at 502.

⁹¹ s. 70 (1) reads "All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interest as may be for the time being subsisting in reference thereto, and such interests shall not be treated as incumbrances within the meaning of this Act, :- (g) The right of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed."

The position is that a wife who has been induced to enter into a transaction by undue influence or misrepresentation of her husband, in certain cases, may be entitled to set aside that transaction against the wrongdoer husband. However, this does not mean she can challenge the rights of the creditors over the charge created by her husband unless the husband was acting on behalf the creditor or the creditor had notice of the fact giving rise to the objection.

The case of *Barclays Bank Plc v O'Brien and Another*⁹² illustrates the matter. In this case the husband charged the matrimonial home jointly owned as a guarantee for his liability for an overdraft to the bank. The wife signed the documents but was not advised of the legal nature of the charge created nor did she read the contract. In an action by the bank for the possession of the house, the court rejected the claim of general undue influence by the husband holding that the question of undue influence is determined from case to case. The court stated in effect that in a society based on recognition of the equality of sexes, the concept that the wife is subservient to the husband in the management of the family's finances can not be accepted.⁹³ The court recognised the fact that in practice many wives are still subject to, and yield to, undue influence by the husband and they should be able to look to the law for protection. That the court will assist the wife only if the creditor had notice, actual or constructive, of the circumstances leading to the suit in question.⁹⁴ The court stated:

⁹² [1993] 4 All ER 417.

⁹³ At p. 422.

⁹⁴ At p. 429. See also *Mtumwa Rashid v Abdallah Iddi and Salum Omary*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 22 of 1993 (Unreported).

“It is easy to allow sympathy for the wife who is threatened with the loss of her home at the suit of the rich bank to obscure an important public interest, viz the need to ensure that the wealth currently tied up in the matrimonial home does not become economically sterile. If the rights secured to wives by the law render vulnerable loans granted on the security of matrimonial homes, institutions will be unwilling to accept such security, thereby reducing the flow of loan capital to business enterprises. It is therefore essential that a law designed to protect the vulnerable does not render the matrimonial home unacceptable as security to financial institutions”.

In addition, the court declined to hold that wives should be accorded special rights in relation to security transactions entered into by them.⁹⁵ However, in Tanzania, the leading section with regard to mortgages of the matrimonial home may be abused by unscrupulous husbands. Section 114 of the Land Act, 1999 states that:

(1) A mortgage of a matrimonial home, including a customary mortgage of a matrimonial home shall be valid only if-

- (a) any document or form used in applying for such a mortgage is signed by, or there is evidence from the document that it has been assented to by the mortgagor and the spouse or spouses of the mortgagor living in that matrimonial home; or
- (b) any document or form used to grant the mortgage is signed by or there is evidence that it has been assented to by the mortgagor and the spouse or spouses living in that matrimonial home.

⁹⁵ At p. 428.

The requirements are in the alternative, that is, a document or form used to apply for or to grant a mortgage must be either signed by both spouses living in the matrimonial home or supported by evidence that it has been assented to by the mortgagor and spouse or spouses living in matrimonial home. The provision does not require an investigation of the manner in which the assent was obtained, which does not eliminate the possibility of presentation of a signature or consent which was obtained in a covert way.

5.5 The impact of the Court of Appeal's decision in *Abualy Alibhai Azizi v Bhatia Brothers Ltd*⁹⁶ on mortgages

It is important to examine the role of the ruling of the Court of Appeal in *Abualy Alibhai Azizi v Bhatia Brothers Ltd* on the law and practice of mortgages. In fact this case resolved the conflict concerning the interpretation and application of the provisions requiring a contract for the sale of the land or mortgage to be approved or consented to by a specified public authority.⁹⁷ That provision that is regulation 3 (1) of the Land Regulation 1960 provides that a disposition of a right of occupancy shall not be operative unless it is in writing and unless and until it is approved by the Governor. However, the ruling in *Abualy Alibhai Azizi v Bhatia Brothers Ltd* was given in 1999 that is before the Land Act came into force in May 2001. The Land Act, 1999 qualified regulation 3 of the Land Regulations 1960 as discussed below.

⁹⁶ Misc. Civil Appeal No. 1 of 1999 (unreported).

⁹⁷ See p. 3.

The Court of Appeal identified three categories of cases interpreting the meaning of the words “shall not be operative” used in regulation 3 of the Land Regulations 1960 as a consequence of failure to comply with the pre-requisite conditions. The first category consists of cases in which it was decided that a transaction which did not comply with the requisite conditions was void *ab initio*.⁹⁸ The second category consists of cases in which it was decided that a transaction which did not comply with the requisite conditions was inoperative only as to change of title, but otherwise, it was operative.⁹⁹ Important is the judgment in *George Shambwe v National Printing Company Ltd*¹⁰⁰ which held that though the agreement was inoperative as it was not approved by the Commissioner, it was nevertheless binding upon the parties.¹⁰¹ Then the last category held that a transaction which lacked consent was inoperative and unenforceable.¹⁰²

Despite the fact that *Abualy Alibhai Azizi v Bhatia Brothers Ltd* deals with regulation 3 of the Land Regulation 1960 which has little application to mortgages, the arguments behind the decision impact on the law and practice of mortgages. Of significance is the interpretation given to the words “shall not be operative” or a phrase of similar nature as a consequence of non-compliance with the formalities in creating a contract. Another

⁹⁸ See p. 6. The cases are *Motibhai Manji v Khurshid Begum* (1957) EA 101, *Fazal Kassam (Mills) Ltd v Abdul Nagji Kassam and Shubanu Bai Gulamhussein* (1960) EA 1042, also see *Chadrakant Vinubhai Patel v Frank Lionel Marealle & Another* (1984) TLR 31, *Methuselah Paul Nyagaswa v Christopher Mbote Nyirabu* (1985) TLR 103.

⁹⁹ see *Mlay v Phoneas* (1968) EA 563, *Alexander Gray Paterson & Another v Bandrudin Mohamed Saleh Kanji & Another* (1956) EACA 106, *Mohamed Hussein Alladitta v Abdalla Bin Salim & Others* (1955), *Mushunga v Rwekanika* (1974) EA 318, *George Shambwe v National Printing Company Ltd* [1995] TLR 262.

¹⁰⁰ [1995] TLR 262.

¹⁰¹ See p. 267.

¹⁰² See *Nitin Coffee Estates Ltd and 4 Others v United Engineering Works Ltd and Another* [1988] TLR 203, *Mohamedbhai Khanbhai & Bros v Mtoo Binti Tafakari & Bhoni* (1953) TLR 433, *T. H. Patel v L. Lawrenson & Another* (1957) EA 249, *Wayani Longo & Another v Israel Solomon Kivuyo* (1988) TLR 263, *Millen Richard v Ayub Bakari Hoza* [1992] TLR 385, *Farah Mohamed v Fatuma Abdallah* [1992] TLR 205 etc.

important aspect of the case is the decision on the impact of section 2 of the Law of Contract Ordinance (Cap. 433).

The court relied on two principles to arrive at its conclusion. The first principle is explained in *Nitin Coffee Estates Ltd and 4 Others v United Engineering Works Ltd and Another*¹⁰³ on the nature of the right of occupancy. It was stated that a right of occupancy is something in the nature of a lease and a holder of a Right of Occupancy occupies the position of a sort of lessee vis-à-vis the landlord. The court observed that the effect of this principle is that a transaction for the disposition of a right of occupancy is necessarily a tripartite transaction involving not only the holder of the right of occupancy and purchaser or donee, but also involving the superior landlord.¹⁰⁴

The second principle is the principle of sanctity of contract. The court adopted this English principle as stated in *Chitty's Law of Contracts*¹⁰⁵ that:

“A concomitant of the doctrine of freedom of contract is that of sanctity of contracts; and is still a cardinal principle of English law because it suits the needs of commercial community.... English law is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud, (actual or constructive) or misrepresentation, and no principle of public policy.”

Basing on the two principles and in view of section 2 (2) of Cap. 433, the court held that the expression “shall not be operative” does not mean shall be void. This means such a

¹⁰³ [1988] TLR 203 at 211.

¹⁰⁴ See p. 15.

¹⁰⁵ Vol. 1, 24th ed. p. 5.

contract is valid. Therefore, a proper contract of mortgage which is inoperative for non-compliance with the pre-requisite conditions is valid but unenforceable only to the extent that such enforcement is prejudicial to the interest of the paramount landlord.¹⁰⁶ It was stated further that where such enforcement is not thus prejudicial, a party who has performed his or her part of the bargain may be assisted by the court to enforce that contract against the defaulting party.¹⁰⁷

The decision in *Abualy Alibhai Azizi v Bhatia Brothers Ltd* was given in a different legal environment, that is, before the provisions of the Land Act, 1999 came into force in May 2001. The case acknowledged the need of public policy to regulate the disposition of land. As a result, some of the discussions, for instance in regard to the general requirement of consent to a disposition, are irrelevant as the Land Act has now changed the general requirement of consent.¹⁰⁸ In addition, the basis for holding that *George Shambwe v National Printing Company Ltd*¹⁰⁹ is only partly sound (thus falling into the second category) because it did not safeguard the interests of the paramount landlord which was overseeing the disposition of land may not stand now. The interests of the paramount landlord in question were safeguarded by the requirement to obtain the consent of the Commissioner for Lands to a disposition. There is a change in public policy in a move to enhance confidence in the land market. This is reflected substantially in the Land Act. As discussed below, the need of the consent of the Commissioner for Lands in a wide range of dispositions is no longer necessary.

¹⁰⁶ See p. 17.

¹⁰⁷ See p. 17.

¹⁰⁸ See part 5.6.2.

¹⁰⁹ See p. 267 where it was held a contract for the sale of land which lacked consent of the Commissioner for Lands pursuant to regulation 3 of the Land Regulations 1960 binds the parties.

However, approval or consent for the disposition of land or interest in land by the way of mortgage is needed.¹¹⁰ For this reason *Abualy Alibhai Azizi v Bhatia Brothers Ltd* is very relevant. The case gives a substantial clarification of the meaning of the words “shall be inoperative” as a consequence of non-compliance with the conditions of the law. The case also gave an important clarification of the application of the principle of sanctity of contract and the role of section 2 of Cap 433 in a contract of mortgage. It also provides an abstract proposition of law about a proper contract for the disposition of land which is rendered inoperative for non-compliance with requisite conditions. The contract is valid and therefore binds the parties.

In practice, it is important to investigate the implication of the case for a proper contract of mortgage in which some ingredients are wanting but saved by the *Abualy Alibhai Azizi case*. It makes this case relevant in other situations for instance, where the contract is not in writing or registered contrary to the requirement of the law. The following issues may be considered: First, what is the position for a contract in which neither of the parties has performed his part of the bargain? For instance, can the mortgagor enforce against the mortgagee the payment of the money in terms of the contract? Secondly, if the mortgagee has fulfilled his part of the bargain, say advancing money to the mortgagor, can he demand that a mortgage is created in his favour, or will he only be entitled to recover from the mortgagor the money advanced? Thirdly, if both parties have fulfilled their parts, will the court treat such a contract as a valid contract and thus require the parties to observe its terms or will the parties be restored to their original positions?

¹¹⁰ See part 5.6.2.

Once it is established that a proper contract of mortgage was concluded, though it was defective for wanting of writing or other conditions, an order for specific performance can be had. Despite the fact that this issue was not decided in the *Abualy Alibhai Azizi case*, there is no reason to deny an order for specific performance as far as the contract is considered as a valid contract. Fry on *Specific Performance of Contracts*¹¹¹ states “no proceedings in specific performance can, of course, be had unless a contract has actually been concluded, i. e., unless two persons have agreed on the same terms, and mutually signified to one another their assent to them.” It is in the discretion of the court to order a specific performance of a contract but the passage above is relevant because it gives the position in regard to the action for a specific performance for a concluded contract.

However, once the contract has been partly executed in the sense that the mortgagor has received the benefits of a mortgage, the mortgagee can enforce specific performance of the contract. In fact *Abualy Alibhai Azizi case* was decided on the view that there was a partly executed contract. After holding that a contract for the disposition of land which is otherwise proper, but fails to comply with the conditions is valid and therefore binds the parties,¹¹² it was stated further that such a contract is unenforceable only to the extent that such enforcement is prejudicial to the interest of the paramount landlord. It was stated:¹¹³

“However, where such enforcement is not thus prejudicial, a party who has performed his or her part of the bargain may be assisted by the court to enforce the contract against the defaulting party.”

¹¹¹ Fry, E. *Specific Performance of Contracts*. 6th ed. London: Stevens and Sons, 1921 at 129.

¹¹² The court ought to have qualified the statement of the validity of a contract which fails to comply with the formalities. By simply stating that such a contract is valid a very bold statement.

¹¹³ See p. 17.

In view of the foregoing discussion, it is possible for the mortgagee to compel the mortgagor to execute the mortgage. The only time when the mortgagee may be entitled to recover the money advanced and expenses is when the execution of the mortgage in question is prevented by some public policy or made impossible by some events. In the like manner, if the contract for mortgage was concluded and both the mortgagor and mortgagee have fulfilled their parts of the bargain, they will be required to observe the terms of the contract.

It is possible to compare the impact of the *Abualy Alibhai Azizi case* on mortgages with position of the law as provided in the Companies Ordinance (Cap. 212). The Companies Ordinance requires a company to register any charge created by them otherwise it becomes void. However, once the charge becomes void for want of registration, the money secured by such a charge becomes payable immediately.¹¹⁴ If this alternative is applied to mortgages, it would cause difficulties especially to mortgagor.

5.6 Salient features of mortgages

There are conditions which must be followed before a disposition of the right of occupancy can be effected. Among the requirements of formalities to be followed in effecting any disposition under the Land Registration Ordinance (Cap. 334) is the requirement that no disposition shall be registered unless is effected by deed and the consent of the Commissioner for Lands has been sought and obtained. Section 41 reads, (1) No disposition shall be registered unless, (a) there is furnished to the Registrar a

¹¹⁴ See s. 79 (1) of Cap. 212.

certificate in writing by the Commissioner for Lands signifying his approval to the disposition;¹¹⁵ and (b) it has been effected by deed. Subsection (2) provides further that no disposition unless registered shall be effectual to create, transfer, vary or extinguish any estate or interest in any registered land.

A mortgage of land is a disposition under section 2 (1) of Cap. 334.¹¹⁶ This means the above conditions have to be fulfilled in creating a mortgage. The Land Act, 1999 impacts on these formalities as will be discussed below.

5.6.1 The requirement of writing in a mortgage

The Land Act, 1999 provides under section 64 for the requirement of writing in creating a mortgage contract. Subsection (1) provides that a contract for the disposition of a right of occupancy, any derivative right in it, or a mortgage is enforceable in a proceeding only if – (a) the contract is in writing or there is a written memorandum of its terms.¹¹⁷ This provision would probably bring a presumption that an unwritten contract would therefore be void. So, the immediate question is what is the position of the law in respect to an unwritten contract of mortgage?

¹¹⁵ See Written Laws (Miscellaneous Amendments) Act, 1997, Act No. 31 of 1997.

¹¹⁶ Disposition is defined as an “act performed inter vivos whereby the owner of a registered estate or interest transfers or mortgages that estate or interest or any part thereof or creates any lesser estate or interest thereout...”

¹¹⁷ s. 64 (2) states that a contract for a disposition referred to in subsection (1) may be made using a prescribed form.

A similar situation has been the subject of court decisions at common law. Early court decisions held that a deposit of title deeds alone without a written contract creates an equitable mortgage.¹¹⁸ Notably, in *United Bank of Kuwait v Sahib*,¹¹⁹ Peter Gibson L.J observed that since 1783 a deposit of title deeds relating to a property by way of security had been taken to create an equitable mortgage of that property without any writing notwithstanding section 4 of the Statute of Frauds 1677 (29 Car. 2, c. 3) and its successor, section 40 of the Law of Property Act, 1925.¹²⁰ Under this, the deposit of title deeds was taken as an act of part performance and thus the doctrine of part performance was invoked to enforce such a contract.

However, with the repeal of section 40 of LPA 1925 and the abolition of the doctrine of part performance by section 2 of the Law of Property (Miscellaneous Provisions) Act, 1989 the same argument could not stand. Now the stringent requirement of section 2 is that a contract for a mortgage of or charge on any interest in land can only be made in writing.¹²¹ This requirement goes to the root of the contract by stating that an unwritten contract of mortgage is no contract.

The Tanzanian situation is identical with the pre 1989 position in England. The Land Registration Ordinance (Cap. 334) simply sets the conditions to be fulfilled before a contract for a mortgage can be registered. It does not legislate on the validity of an unwritten contract of mortgage. Such an unwritten contract which may not be registered

¹¹⁸ See *Russel v Russel* 28 ER 1121; *In re Richardson* (1885) 30 Ch. D. 396; *Harrold v Plenty* [1901] 2 Ch. 314; *Stubbs v Slater* [1910] 1 Ch. 632; *Edge v Worthington* 29 ER 1133; *Ex p Montfort* 33 ER 653 etc.

¹¹⁹ [1997] Ch 107 at 132.

¹²⁰ The Statute of Frauds 1677 is applicable in Tanzania.

¹²¹ *United Bank of Kuwait v Sahib* at 136C.

for lack of writing is a valid contract. The effects of such an unwritten contract of mortgage under section 41 flow from the consequences of an unregistered but valid contract of mortgage.

Similarly the Land Act, 1999 simply states that a contract for a mortgage shall not be enforceable unless it is in writing. However, the irregularity of an unenforceable contract of mortgage for lack of writing is cured by section 2 of the Law of Contract Ordinance (Cap 433) which states:

(1) In this Ordinance the following words and expressions are used in the following senses, unless the contrary intention appears from the context:-

(g) an agreement not enforceable by law is said to be void

(j) a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable

(2) Notwithstanding the provisions of paragraphs (g) or (j) of subsection (1) of this section, where any written law in force in the Territory on the date on which this Ordinance comes into operation provides that an agreement (however described), of the kind specified therein, shall not be enforceable by action unless or until certain requirements therein specified are complied with, or certain consents are obtained, no such agreement shall be void by reason only that it is

not enforceable by action under the provisions of that law for want of compliance with any such requirement or of the obtaining of any such consent.

The Court of Appeal in *Abualy Alibhai Azizi v Bhatia Brothers Ltd*¹²² explained that section 2 (2) of Cap. 433 renders a contract which is unenforceable for failure to comply with certain requirements, valid. After distinguishing cases which held that a contract which failed to comply with the requirement of the law was void, the Court observed that “we note that the decisions of cases made before the enactment of the Law of Contract Ordinance and which held to the effect that non-compliance with the statutory requirement of consent or writing rendered a contract void, were correct according to law applicable then, but ceased to be precedents on the matter after 1960”.¹²³

This means an unwritten contract of mortgage will still be valid and may be enforced. However, it is desirable that a contract of mortgage should be in writing in compliance with section 64 of the Land Act, 1999 and section 41 of Cap. 334. Apart from the fact that writing makes it easy to ascertain the terms of the contract, it facilitates matters related to attestations and execution of instruments.¹²⁴ In case there is an unwritten contract and a party has acted upon such a contract, such a contract will bind the parties and the doctrine of part performance is available to assist the injured party.

¹²² Misc. Civil Appeal No. 1 of 1999 (unreported) at pp. 15 – 17.

¹²³ See p. 16.

¹²⁴ See s. 63 of the Land Act, 1999. Also ss. 92 and 93 of Land Registration Ordinance (Cap. 334) for execution of documents.

5.6.2 The requirement of consent to mortgage

In an attempt to control the alienation of land whether by the way of sale, mortgage or otherwise, the position of the law was that the consent of the Commissioner for Lands must be sought and obtained as a condition precedent to a disposition of land. This was a strict requirement which was eroded by the coming into force of the Land Act, 1999.

The governing provision of the law was regulation 3 of the Land Regulations 1960. The regulation states as follows:

3 (1) A disposition of a right of occupancy shall not be operative unless it is in writing and unless and until it is approved by the Governor.

(2) [...]

(3) In this regulation 'disposition' means –

(a) a conveyance or assignment other than by way of mortgage, or a gift, settlement, deed or partition, assent, vesting declaration, or a sale in execution of an order of court;

(b) a mortgage other than –

(i) an equitable mortgage by deposit of title deeds; or

(ii) a mortgage which by law is only effectual if registered in the register of documents or the land register;

(c) A deed or agreement or declaration of trust binding any party thereto to make any such disposition as aforesaid, including a deed or agreement entitling a party thereto to require any such disposition to be made;

(d) A decree of foreclosure of a mortgage.

Regulation 3 particularly sub-regulations (3) (b) (i) and (ii) seemed to have excluded a wide range of mortgage transactions from its domain.¹²⁵ Under the regulations mortgage by deposit of title deeds and mortgages which are registered in the land register or register of documents are not dispositions under the Land Regulations 1960 and therefore do not require the consent of the Commissioner for Lands pursuant to regulation 3.¹²⁶

As shown above, regulation 3 (1) of the Land Regulations provides that a disposition of the right of occupancy shall not be operative unless the consent has been obtained. Different judicial opinions were expressed concerning the effect of the transactions which lacked the consent of the Commissioner in compliance with regulation 3 of the Land Regulations 1960. It was summed up in *Abualy Alibhai Azizi v Bhatia Brothers Ltd*¹²⁷

¹²⁵ See part 5.6.3 below for the registration of mortgage under Cap. 334 and Cap. 117.

¹²⁶ See *Guaranty Discount v Credit Finance Ltd* [1963] EA 345 at 350.

¹²⁷ Misc. Civil Appeal No. 1 of 1999 (unreported) at p. 17.

that the expression “shall not be operative” as used under regulation 3 of the Land Regulations 1960 did not mean void, which means the contract is valid.¹²⁸

A mortgage of registered land is a disposition under the Land Registration Ordinance (Cap. 334) which has to be registered in the land register.¹²⁹ However, section 41 (1) (a) stated that such a mortgage could not be registered unless there was furnished to the registrar a certificate in writing by the Commissioner for Lands signifying his approval of the disposition.

With the coming into force of the Land Act, 1999 the general requirement of the consent of the Commissioner to dispositions has been waived. What is needed is a notice to the Commissioner notifying him of a disposition. Section 36 (2) states that a disposition of a right of occupancy shall not require the consent of the Commissioner or an authorized officer. Subsection (3) provides further that a person proposing to carry out a disposition by way of mortgage or otherwise, is required to send or deliver a notification in the prescribed form¹³⁰ to the Commissioner or an authorized officer before or at the time the disposition is carried out. In this, the Commissioner under subsection (4) endorses the notification with his signature and official seal and sends a copy to the Registrar.¹³¹

Section 36 set out the general position of the law in regard to dispositions of land. However, there is a limited category of dispositions which still requires the approval of

¹²⁸ See p. 17.

¹²⁹ See the definition of disposition under s. 2 (1) of Cap. 334. See also s. 41 (2).

¹³⁰ See Land Form No. 29, the Land (Forms) Regulations 2001, GN No. 71 of 4/5/2001.

¹³¹ See s. 36 – 41 of the Land Act, 1999.

the Commissioner for Lands. The category concerns mortgages of land. Section 37 of the Land Act, 1999 provides that:

- (1) The Commissioner shall have the power to consider and approve categories of dispositions under this Act.

Then, regulation 3 of the Land (Disposition of Right of Occupancy) Regulations, 2001¹³² made under section 37 and section 179 of the Land Act, 1999 reads “the following dispositions shall require approval under the Act –

- (b) a loan granted on the security of every mortgage of a right of occupancy or mortgage of a lease;

The effect of regulation 3 (b) is to make mortgage transactions liable to the requirement of approval of the Commissioner for Lands. The exceptions for the requirement of approval for a mortgage are where the mortgage is by a prescribed lender¹³³ which in turn is liable to the supervisory power of the Commissioner under section 38 of the Land Act, 1999.¹³⁴ Otherwise failure to obtain the approval renders a mortgage inoperative.¹³⁵

¹³² GN No. 74 published on 4/5/2001.

¹³³ s. 37 (3) of the Land Act, 1999. See also regulation 4 (2) (b) of the Land (Disposition of Right of Occupancy) Regulations, 2001, GN No. 74 of 4/5/2001. I am not aware of the meaning of a “prescribed lender” because it is not provided anywhere.

¹³⁴ Before the amendment of the Land Act, 1999 in 2004, another exception involved a small mortgage whereby the borrower was under the duty to notify the Commissioner under section 36 of the Land Act, 1999 the intention to carry out a mortgage. See regulation 7 of GN No. 75 of 4/5/2001.

¹³⁵ See s. 37 (5) of the Land Act, 1999. It is the governing provision in regard to the effect of the disposition which lack the approval of the Commissioner under s. 37. On the other hand, s. 36 (1) (b) reads a disposition of the right of occupancy shall be void if the provisions of ss. 37-40 are not complied with, is general and therefore overridden by a specific provisions under section 37 (5).

The requirement to obtain consent to a mortgage is unfortunate in the free market economy which the Land Act tries to facilitate. The consent of the Commissioner for Lands was necessary in the closed economy era, not in the present market economy. The involvement of a third party, in this case the Commissioner slows down dispositions. The requirement to obtain consent to a mortgage should have been abolished altogether.

Even a supposedly lesser requirement for instance, to issue a notice before selling the mortgaged land is irrelevant in the present business environment. It simply serves as a snag. A notice of intention to sell can in effect be used as consent. This is because a transfer of an estate after a sale can not be registered unless a notice to sell was endorsed by the Commissioner for Lands. It follows therefore that a sale following a notice which is not endorsed may not be registered.

The provisions in regard to consent and notices should have not been included under the Land Act because they potentially slow down dispositions of interests in land and unnecessarily may lead to corruption or bureaucracy by involving a third party in essentially a bipartite transaction.

The enactment of the need to seek consent shows the reluctance on the part of the government to take a new position as a facilitator of landed transactions rather than a party. The need to give notice was a half hearted attempt because of the possibility of it being misused by the government.

The only thing required instead of the need for notice or consent is an improvement in the registration of titles and estates in land to the extent that all facts involving land could be discovered by a search in the land register. In that case, there would be no need to issue a notice to the Commissioner on a disposition such as a sale of land. Similarly, there should be no need for consent before creating a mortgage and no supervisory power of the commissioner should be involved in persons' private transactions.

The following is an example of the form used for the application of approval for a disposition.

FORM FOR THE APPLICATION OF APPROVAL FOR DISPOSITION

(Land Form No. 30)

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999

(NO. 4 OF 1999)

APPLICATION FOR APPROVAL OF DISPOSITION(S)

{Under Section 39}

C. T. No

L. O. No

L. D. No

I/WE.....
of P. O. Box..... (hereinafter
referred to as “the Applicant”)

HEREBY APPLY for APPROVAL of disposition(s) of a right of occupancy registered
under the above reference on theday of

1. Nature of disposition (state nature of disposition)
.....

2. Particulars of purchaser/assignee/mortgagee (if not a prescribed lender)
.....

3. I/WE, the Applicant(s) supply the following information and or documentation
.....

Date.....

APPLICANT(S)

For Official Use Only

a) Approved/Refused

b) Remarks.....

Commissioner for Lands/Authorised Officer

Date:

Fee:

5.6.3 Registration of mortgage

Registration of dealings in land whether by way of mortgage, lease or sale of the right of occupancy is provided for under different laws. The Land Act, 1999 in section 62 (2) states that no instrument effecting any disposition under this Act shall operate to sell or assign a right of occupancy or create, transfer or otherwise affect any right of occupancy, lease or mortgage until it has been registered in accordance with the laws relating to the registration of instruments affecting the land in respect of which the disposition has been made. Furthermore, section 113 (4) of the Land Act, 1999 states that “in respect of a mortgage other than a mortgage of land registered under the Land Registration Ordinance (Cap. 334), it shall take effect only when it is registered in a prescribed register and a mortgagee shall not be entitled to exercise any of his remedies under the mortgage if it is not so registered.”

The Land Registration Ordinance provides for the compulsory registration of dispositions of registered land.¹³⁶ Section 41 (2) provides that no disposition unless registered shall be effectual to create, transfer or extinguish any estate or interest in any registered land. A mortgage of land is a disposition under section 2 (1) of Cap. 334.

In addition to Cap. 334, the Registration of Documents Ordinance (Cap. 117) provides under section 9 that no document of which registration is compulsory shall be effectual to pass any land or interest therein or render such land liable as security for the payment of

¹³⁶ s. 2 (1) of Cap. 334 define “unregistered land” to mean land other than registered land. Registered land for the purpose of Cap. 334 means a land subject to a long term granted right of occupancy which is registrable under section 27 of Cap. 334.

money, or be received as evidence of any dealing affecting such land unless and until it is registered. By section 8 registrations under Cap. 117 is compulsory in a number of dealings, but exclude from registration under the Ordinance all documents relating to land.¹³⁷ One may opt under section 11 of Cap. 117 to register in the register of documents a mortgage of unregistered land.¹³⁸

The registration of a mortgage is a final requirement in the process of creating a mortgage. Registration completes a mortgage transaction and makes it effective. It is important to note that there is a special registration requirement on companies for mortgages or charges created by them. The requirements are imposed by Companies Ordinance (Cap. 212). Section 79 of Cap. 212 requires companies to register with the Registrar of Companies all charges created by them over their land. The charges have to be registered within forty-two days of their creation otherwise they become void against the liquidator or creditor of the company. This provision applies, *inter alia*, to charges of immovable property wherever situate or any interest therein, which includes mortgages of land.¹³⁹

The requirement to register charges created by companies means a mortgage of land created by a company must first be registered with the Registrar of Companies under Cap. 212. Then such a mortgage must be registered in the Land Register.

¹³⁷ See *Shinyanga Regional Trading Co Ltd and Another v National Bank of Commerce* [1997] TLR 78 at 87 – 89; *Guaranty Discount Co v Credit Finance Ltd* [1963] EA 345 at 350.

¹³⁸ Unregistered land is all land other than registered land, see s. 2 of Cap. 334. Most of the land held under customary law is unregistered.

¹³⁹ See sub-section (2) (d). Other charges in which s. 79 applies include a charge for the purpose of securing any issue of debentures; a charge of uncalled share capital of the company; a charge on immovable property wherever situate, or any interest therein; a floating charge on the undertaking or property of the company etc, see s. 79 (2) (a) – (i). Also see s. 59 of Cap. 334

5.6.3.1 Effect of failure to register a mortgage

As already observed, a mortgage of registered land must be registered to have legal effect. Failure to register a mortgage of registered land at the land register will render such a mortgage ineffectual to create, transfer, vary or extinguish any estate or interest in any registered land.¹⁴⁰ A mortgage which is otherwise proper but becomes ineffectual for lack of registration retains all the attribute of a valid mortgage and therefore will bind the parties.¹⁴¹ However, failure to register a mortgage or charge created by a company by virtue of Cap. 212 makes such a charge void. In *Guaranty Discount Co v Credit Finance Ltd*¹⁴², it was held that the effect of failure by the company to register a legal mortgage by virtue of section 79 of Cap. 212 is to make such a charge void against the liquidator.¹⁴³ Subsection (1) provided further that a void charge shall not prejudice any contractual obligation for repayment of the money thereby secured and that once such a charge becomes void the money secured becomes payable immediately.¹⁴⁴

In case the mortgagor created second or subsequent mortgages, they all have to be registered. The law stipulates that upon registration mortgages shall rank according to the order in which they are registered and not according to the order in which they are

¹⁴⁰ s. 41 (2) of Cap. 334. See also s. 9 of Cap. 117.

¹⁴¹ s. 62 of the Land Act, 1999 provided among others, for the registration of instrument effecting disposition of land. Subsection (4) provided further that “this section shall not apply to or affect the operation of any contract for a disposition under this Act”.

¹⁴² [1963] EA 345.

¹⁴³ See p. 361. Court relied on s. 79 (1) of Cap. 212 which stipulate that failure to register a charge created by a company is to render such a charge void against the liquidator or creditor of the company. See also *Shinyanga Regional Trading Co Ltd and Another v National Bank of Commerce* [1997] TLR 78 at 91 where it was held failure to register a charge under s. 79 of Cap. 212 render such a charge null and void.

¹⁴⁴ Note s. 96 (1), (2), and s. 97 of Companies Act, 2002, Act No. 12 of 2002. Companies Act, 2002 is yet to come into force.

created.¹⁴⁵ As for informal mortgages and liens by deposit of documents, they shall rank according to the order in which they are made provided that where an informal mortgage is registered under section 11 of Cap. 117, it shall take priority over any unregistered informal mortgage or lien by deposit of documents as the case may be.¹⁴⁶ The rules applicable to priority of informal mortgages apply to customary mortgages.¹⁴⁷

A mortgage once registered will attach to the land. It will be an incumbrance against the title to the land and thus any transferee of such an estate will be deemed to have an actual notice of a charge.¹⁴⁸ In addition, the fact of registration is proof that all the requirements of the law under which registration is required have been fulfilled.¹⁴⁹ However, this does not mean that the fact of registration turns a bad mortgage into a good one, as was stated in *Guaranty Discount Co. v Credit Finance Ltd*,¹⁵⁰ or that a defective mortgage becomes good with registration.

However, in the absence of fraud, once registered, a mortgage passes the legal title it intended to convey. Section 40 of Cap. 334 enacts that a certificate of title shall be admissible as evidence of the several matters therein contained. Furthermore, section 82 (2) of Cap. 212 provides that the certificate of registration shall be conclusive evidence that the requirements of this Ordinance as to registration have been complied with.

¹⁴⁵ See s. 60 (1) of Cap. 334, s. 10 of Cap. 117 and s. 117 (1) of the Land Act, 1999.

¹⁴⁶ See s. 117 (2) and (6) of the Land Act, 1999.

¹⁴⁷ S. 117 (3) of the Land Act, 1999.

¹⁴⁸ See s. 34 of Cap. 334.

¹⁴⁹ In *Harshad Ltd. v Globe Cinema Ltd and Others* [1960] EA 1046 at 1049 (PC), it was held that the law provides that variation in the forms contained in the schedules, not being matters of substance, shall not affect the validity of the mortgage. The court went on to state that “once registered then the rights conferred by the law proceed to flow otherwise it would defeat the whole purpose of the Ordinance if, in absence of fraud, a litigant could go behind the fact of registration....”

¹⁵⁰ See p. 351.

In *National Provincial and Union Bank of England v Charnley*¹⁵¹, Atkin LJ gave the position of the law as to registration stating, “it appears to me to be the true view that once a certificate has been given by the registrar in respect to a particular specified document which in fact creates a mortgage or charge, it is conclusive that the mortgage or charge so created is properly registered, even though the particulars put forward by the person applying for registration are incomplete, and the entry in the register by the registrar is defective.”

The above statement is relevant in Tanzania as it complements some of the provisions of the law as shown above. Both the statement and the foregoing provisions underlie the principle of the sanctity of the register.¹⁵² The principle is that, except in the case of actual fraud, the court will not go behind the register.¹⁵³

5.7 Extinction of the subject matter of the mortgage

The discussion of the consequences of the extinction of the subject matter of the mortgages is relevant in Tanzania because of the nature of the mortgaged interest. We have seen that what is mortgaged is the estate or interest of the right of occupancy. We

¹⁵¹ [1924] 1 KB 431 at 452. Also see *In re Yolland, Husson and Birkett* [1908] Ch. 152 at 158.

¹⁵² See *Govindji Popatlal v Nathoo Visandji* [1962] EA 372 at 376.

¹⁵³ See *Guaranty Discount Co. v Credit Finance Ltd* at 351 per Sir Trevor Gould, Ag. V.-P. In the Ugandan case of *Olinda De Souza Figueiredo v Kassamali Nanji* [1962] EA 756 at 758, in an action for the declaration that the registered mortgage was void because it was signed only by the mortgagor, the court held in absence of fraud, a court will not go behind the fact of registration. Also *Olinda de Souza Figueiredo v Kassamali Nanji* [1963] EA 381. In a Privy Council case of *Waimila Sawmilling Co. Ltd. v Waione Timber Co. Ltd* [1926] AC 101 at p. 106 was stated that “The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of person dealing with the registered proprietor such person upon the registration of title under which he take from the registered proprietor has an indefeasible title against all the world”. One may want to investigate situations where courts may go beyond the fact of registration.

have seen also that the right of occupancy is a mere right to occupy and use land. It is a usufructuary right granted by the president under section 29 of the Land Act, 1999.¹⁵⁴ In the like manner, under section 48 the president for good cause or in the public interest may revoke a right of occupancy. Section 45 (2) lists what constitutes good cause to warrant such revocation.¹⁵⁵

Revocation of the right of occupancy is one of the factors which may result in the extinction of the subject of a mortgage. Other acts such as the surrender of a right of occupancy may not extinguish a subject of a mortgage because surrender is not allowed where the land is subject to a mortgage.¹⁵⁶ The effect of revocation of the right of occupancy which is subject to a mortgage or charge is the destruction of all the rights and interests created out of that right of occupancy. The effect of revocation of the right of occupancy is provided for under section 49 of the Land Act, 1999 which reads:-

(2) Upon the approval of the revocation by the President-

(a) the right of occupancy to which it refers shall determine immediately and without further action;

¹⁵⁴ See also s. 6 and 12 of the Land Ordinance (Cap. 113).

¹⁵⁵ Grounds for revocation listed in section 45 (2) are where (i) there has been an attempted disposition of a right of occupancy to a non-citizen contrary to this Act and any other law governing dispositions of a right of occupancy to a non-citizen; (ii) the land the subject of the right of occupancy has been abandoned for not less than two years; (iii) where the right of occupancy is of an area of not less than five hundred hectares, not less than eighty per centum of that area of land has been unused for the purpose for which the right of occupancy was granted for not less than five years; (iv) there has been a disposition or an attempt at a disposition which does not comply with the provisions of this Act; (v) breach of a condition contained or implied in a certificate of occupancy; (vi) breach of any regulation made under this Act. (3) Notwithstanding the provisions of subsection (2) above, the President may revoke a right of occupancy if in his opinion it is in public interest to do so. See also s. 51 of the Land Act, 1999 for the abandonment of the right of occupancy and its effect. See also s. 10 (1) of Cap. 113.

¹⁵⁶ An occupier of land held under a right of occupancy may surrender the land to the Commissioner for Lands. But the Commissioner is not allowed to accept surrender unless among others, the land is not subject to any subsisting mortgage, charge or encumbrance. See s. 42 (2) of the Land Act, 1999.

(b) all derivative rights, created out of the right of occupancy which has determined shall determine immediately and without further action;¹⁵⁷

(c) all rights and interests in the land the subject of the right of occupancy shall revert to the President and the same shall be registered in the Land Register;

(d) []

(e) []

(f) all proceedings relating to the right of occupancy or the land the subject of the right of occupancy which were or could have been commenced against the occupier and all the proceedings which were or could have been commenced against any person, other than the Commissioner, by the occupier shall be taken over by the Government and thereafter shall be pursued against or by the Government as the case may be provided that in any case in which the Government is a defendant, the Government may join the former occupier as a co-defendant and shall have a right to call upon or take action which may be necessary to compel the former occupier to pay damages or costs which may be awarded against the Government in such a case.

¹⁵⁷ Derivative right means a right to occupy and use land created out of a right of occupancy and includes a lease, a usufructuary right and any interest analogous to those interests, see s. 2 of the Land Act, 1999.

The effect of the foregoing provisions, especially paragraph (c) of subsection (2) would be for the President to assume the position of the mortgagor. In any case, paragraph (f) of subsection (2) enables the mortgagee to proceed against the Government to enforce the mortgage or otherwise.

It is apparent that once the right of occupancy is revoked, or the property mortgaged is compulsorily acquired under the Land Acquisition, Act, 1967 or the property is demolished after an operation *bomoa bomoa* following a government's order of demolition, the charge over the property comes to an end. The security is extinguished and hence the loan becomes unsecured, but the obligation to repay the money under the mortgage remains. This was the case in *Mansoor Industries Ltd v CRDB Bank Limited*¹⁵⁸ where the plaintiffs sought to be discharged from their contractual obligation after the property charged was demolished pursuant to the government's order of demolition of the house. It was held that the destruction of the security does not reduce or bring to an end the borrower's liability.

The guiding principle is the fact that a mortgage has two elements. These two elements are distinct though linked together. On one hand you have the contract for money which comes with its obligation to repay the money and on the other hand, a charge over property to secure the payment. So where the subject matter of the charge ceases to exist, the charge ceases to exist as well.¹⁵⁹ This is because the mortgage is just a security for the money and therefore the destruction of the subject matter of a mortgage destroys the

¹⁵⁸ High Court (Commercial Division) at Dar es Salaam, Commercial Case No. 286 of 2004.

¹⁵⁹ See *Manyara Estates Ltd and Others v National Development Credit Agency* [1970] EA 177 at 185.

security and the mortgagee's possibility of recourse to it, but not the mortgagor's contractual obligation to repay the money.

5.8 Mortgage of land as a security

The stipulations under the Land Act, 1999 of the nature of the mortgage especially where the right of occupancy has been revoked is vital. The reason behind this is that once the right of occupancy has been revoked by the President, compensation for unexhausted improvements becomes payable under section 49 (3) of the Land Act, 1999.¹⁶⁰ We have seen in part 5.7 that in the case of a right of occupancy which was subject to a mortgage, after revocation the security is destroyed and the loan becomes unsecured. This may leave the mortgagee with only the personal right of action against the mortgagor, an action which may be futile. As a result a presumption was that the mortgagee should be entitled to appropriate compensation payable to the mortgagor to satisfy the money due under the contract of mortgage. That was not the case.

In *Manyara Estates Ltd & Others v National Development Credit Agency*¹⁶¹ the issue was considered. In this case the respondent was a mortgagee who successfully received judgment entitling him to receive compensation payable to the mortgagor whose right of occupancy was revoked by the President. The appellants were other creditors who had also received judgments against the mortgagor. One issue which arose was whether the charge created by the mortgage attached to the money payable to the mortgagor in respect

¹⁶⁰ See s. 14 of Cap. 113.

¹⁶¹ [1970] EA 177.

of unexhausted improvements following the revocation of the right of occupancy. In other words, whether the respondent, by reason of its mortgage, had stepped into the shoes of the mortgagor and was therefore entitled to receive compensation money to satisfy the debt in preference to unsecured creditors.

The court relied on section 57 of the Land Registration Ordinance (Cap. 334) which provided that:

“A mortgage shall, when registered, have effect as a security and shall not operate as a transfer of the estate thereby mortgaged, but the lender shall have all the powers and remedies in case of default and be subject to all the obligations that would be conferred or implied in a transfer of the estate subject to redemption.”

It was held that this section did not entitle the mortgagee to be treated as if it had been the occupier of the land and thus receive the amount payable as compensation. It was stated that “all that s. 57 does is to give a mortgagee the powers and remedies it would have had if the right of occupancy had been transferred by the mortgage to the mortgagee subject to the equitable right of redemption; and these powers and remedies are quite different from the rights of the mortgagor to receive money for unexhausted improvements.”¹⁶² The court stated further “the charge created by the mortgage of a right of occupancy is a charge over the right to use and occupy public land. This is purely a usufructuary right; thus the charge ceases to exist when the subject matter of the charge ceases to exist, as there is no *res* to which an action in *rem* can apply.”¹⁶³

¹⁶² See p. 185.

¹⁶³ At p. 185. See also the dissenting view of Duffus, V.P. at 189.

Section 57 of Cap. 334 is rewritten with modification in section 116 of the Land Act, 1999.¹⁶⁴ Section 116 simply states that a mortgage shall have effect as a security only and that it shall not operate as a transfer of any interests or rights in the land from the borrower to the lender but the lender shall have all the powers and remedies in case of default by the borrower and be subject to all the obligations that would be conferred or implied in a transfer of an interest in land subject to redemption. Section 116 stresses the fact that a mortgage is for the purpose of securing the payment of money and nothing more. The provision in principle incorporates and entrenches in the Act a well established equitable principle that “once a mortgage always a mortgage”.¹⁶⁵

As a result of the decision in *Manyara Estates Ltd & Others v National Development Credit Agency* and the realisation of the injustice which may be occasioned, section 14 of Cap. 113 was amended by Act No. 28 of 1970 by adding section 14B which states that:

14B Where any amount is paid to the President on behalf of a previous occupier in accordance with the provisions of paragraph (b) of section 14 and the President is satisfied that -

(a) such previous occupier had created a mortgage on the right of occupancy of the land previously held by him; and

¹⁶⁴ The only material difference between the two sections is that s. 57 of Cap. 334 starts by stating that “a mortgage shall, when registered, have effect as a security...”, while s. 116 of Land Act, 1999 simply state “...a mortgage shall have the effect as a security only...”. The omission of the word registered in s. 116 is probably intentional. Section 116 incorporates mortgages whether registered or unregistered. Section 116 of the Land Act, 1999 reproduces section 115 of the Land Act, 1999 (original text).

¹⁶⁵ See *Biggs v Hoddinott* [1898] 2 Ch 307 at 321 per Chitty LJ where it was stated “Equity has always looked upon a mortgage as only a security for the money, and here the right of the mortgagor to redeem on payment of principal, interest, and cost is maintained”; also see *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at 38.

(b) that the amount payable to the mortgagee in respect of such mortgage remains wholly or partly unpaid, the President shall, out of the amount so received by him, make payment to the mortgagee of the amount remaining due to him under the mortgage...

However, the Land Act, 1999 does not contain similar provisions regarding the possibility of the mortgagee receiving compensation for unexhausted improvements payable to the occupier when the right of occupancy is revoked. As a result, the only cause available to the mortgagee may be to proceed against the Government and the mortgagor (the previous occupier) under section 49 (2) (f) or to protect himself by extracting a covenant from the mortgagor binding him that in event of the right of occupancy being revoked, the mortgage debt shall be secured additionally on any compensation in respect of unexhausted improvements payable to the mortgagor.¹⁶⁶

¹⁶⁶ See *Manyara Estates Ltd & Others v National Development Credit Agency* at 183 per Law J.A.

CHAPTER SIX

RIGHTS OF PARTIES UNDER A MORTGAGE

6.1 Introduction

In this chapter, we will discuss the rights of parties under a mortgage. The rights to be discussed are legal and equitable rights. In addition parties may stipulate in the mortgage deed terms suitable for the circumstances of their mortgage. These later stipulations need not be contrary to the clear terms of the laws.

As discussed below, some rights are implied in any mortgage contract, while others become exercisable only if contained in the mortgage deed. We will discuss these rights in a sequence beginning with the rights of the mortgagor, then mortgagee, and lastly the rights available to both.

6.2 Rights of the mortgagor

A mortgage is a contract. The agreement to lend money is a simple contract transaction. This makes the general principles of contract such as that a man should abide by his contract applicable. In addition, some contractual remedies may be available to parties under a mortgage. For instance, the debt or obligation under the mortgage may be impeachable for misrepresentation, undue influence, or fraud etc.¹ But the act of

¹ See *Santley v Wilde* [1899] 2 Ch 474 at 475.

conveying an interest or estate in land or property to secure the payment of the money advanced is a property transaction. This fact makes a mortgage a property transaction as well. As a result, the mortgagor is also entitled to legal and equitable rights incidental to mortgages. Contractual rights in certain circumstances are overridden by legal or equitable rights. In this situation a mortgagor may contract away his right and yet equity may disregard clear terms of the contract and grant him relief. These rights especially ones based on equitable consideration may seem to interfere with the general contractual principles.²

A mortgagor has a range of legal and equitable rights available to him. He may create a second or subsequent mortgage over the same land. The mortgagor in possession of the mortgaged land³ subject to qualification may deal with the land in the sense that he may dispose of the land by contract or in compliance with the requirement of the law.⁴ The mortgagor may also transfer his rights under a mortgage to a third party. One important right is the power to transfer the equity of redemption.

6.2.1 Creation of second and subsequent mortgages

The mortgagor can create a second and subsequent mortgage over the mortgaged land. This happens when the mortgagor is in need of further advances either from the same

² See *Biggs v Hoddinott* [1898] 2 Ch. 307 at 313 per Romer J.

³ Despite the fact that the mortgagee has the right to go into possession at any time because he has a legal term (estate) of years in the property, business convenience and legal limitations makes it unnecessary to enter into possession. The mortgagee in possession will have to account for the profit accrued while in possession. As a result the mortgagor is left in possession of the mortgaged property.

⁴ The Land Act, 1999 defines dealing to include disposition and transmission. See s. 2 of the Act.

mortgagee or some other money lender. To begin with, section 113 (1) provides for the creation of an ordinary (formal) mortgage⁵ and the power to create second and subsequent mortgages is provided for under subsection (2). It states that the power to create mortgage under subsection (1) shall include the power to create second and subsequent mortgages. In that sense, the second and subsequent mortgages would necessarily follow the original formal mortgage created under subsection (1) of section 113 of the Land Act, 1999.⁶ The ordinary (formal) mortgage which might be by assignment of the term in the right of occupancy or lease, or a transfer of a lesser term in the right of occupancy or lease, would, unless the mortgagor assigns the whole of his term means that any subsequent mortgages over land to be for a term longer than the previous mortgage or mortgages. This will give the subsequent mortgagee or mortgagees a nominal chance of possession of the mortgaged land.

The second or subsequent mortgages created in favour of the same mortgagee may be by the way of tacking. To determine the effect of this requires an examination of priority of the mortgages especially if there are intermediary mortgages executed in favour of different mortgagees. In general if the mortgage creates a right to tack, subsequent mortgages created in favour of the same mortgagee would have priority against intermediate mortgages to different mortgagees.⁷

It is important to note that the mortgagor needs the consent of the mortgagee in writing before he can create second and subsequent mortgages. That is the effect of the implied

⁵ See Chapter Five, part 5.3.1.

⁶ See Chapter Five, part 5.3.1.

⁷ See part 6.3.2.

covenant under section 124 (1) (g) of the Land Act, 1999, which prevents the mortgagor from transferring or assigning the right of occupancy or lease or part of it without the consent of the mortgagee. The need for consent is a control mechanism afforded by law to the mortgagee. The power enables the mortgagee to control the activities of the mortgagor especially those dealings which may prejudice his interest. However, the law directs that the consent of the mortgagee should not be unreasonably withheld.⁸

Section 113 (2) of the Land Act, 1999 which gives the power to create secondary and subsequent mortgages is unnecessarily tied to subsection (1), a provision conferring power to create ordinary (formal) mortgages.⁹ This cast doubt as to the possibility of creating secondary and subsequent mortgages of other forms of mortgages by relying on subsection (2). For instance creating a secondary mortgage of informal mortgage under section 113 (5) (a).¹⁰

In principle one can create second and subsequent mortgages of an informal mortgage.¹¹ In the like manner, a mortgagor of a mortgage by deposit of title deeds can create second or subsequent mortgages by charging the property as a security for the money advanced. But it is doubtful if a mortgagor of a mortgage created by deposit of title deeds can create second and subsequent mortgages by depositing the deed. This is because the original deposit of the title deed will have the effect of requiring him to literally hand over the

⁸ s. 124 (1) (g) of the Land Act, 1999.

⁹ s. 113 (2) states “the power conferred by subsection (1) shall include the power to create third-party mortgages and secondary and subsequent mortgages”.

¹⁰ s. 113 (2) should read “the power to create mortgage under this section shall include the power to create third-party mortgages and secondary and subsequent mortgages”.

¹¹ For ranking of informal mortgages, see s. 117 (2) and (4) of the Land Act, 1999.

custody of the deed to the mortgagee. The only possibility of creating second and subsequent mortgages by re-deposit of title deeds is for the mortgagor to obtain a deed from the original mortgagee so that second and subsequent mortgagees can inspect the deed and obtain a copy to effect the deposit.¹²

6.2.2 Right of redemption

The mortgage is executed under the assumption that the transferred interest or estate will be reconveyed after the payment of the money owed or performance of the conditions upon which the mortgage is given. The right to demand recoveyance of the transferred interest or estate is the right of redemption or the right to redeem. The right to redeem whether legal or equitable depends on the contractual date.¹³ The legal right to redeem is the right which arises on the contractual date. However, if the mortgagor fails to redeem on the contractual date, he is entitled to the equitable right to redeem which is part of the equity of redemption. The equity of redemption is a total of mortgagors' rights in the mortgaged land or property. It is a general right which arises as soon as the mortgage is created. The equity of redemption includes the equitable right to redeem.¹⁴ The exercise of the equitable right to redeem is the main concern of this part.

A proprietor of the land or any other property who is in need of the money may, among other transactions, raise some money by either selling the property or obtaining a loan

¹² Note s. 117 (6) of the Land Act, 1999.

¹³ A different situation may arise if the date is not fixed. Normally if the date is not fixed, the advance becomes due and payable with interest on demand.

¹⁴ For the distinction between the equity of redemption and equitable right to redeem. See Chapter Four, part 4.3.1.

and mortgaging the property. A sale conveys the property to the buyer without the possibility of getting the property back, while a mortgage entitles the mortgagor to redeem on performance of the conditions upon which the mortgage was given. However, a sale or mortgage transaction may sometimes be worded in a way which makes it difficult to distinguish between the two. This is a common phenomenon under customary mortgage or customary pledge. In principle a sale is a sale and a mortgage will remain a mortgage and therefore a court will not set aside a genuine sale of land dressed as a mortgage.

To be entitled to the equitable right to redeem, it is important first to establish whether a transaction in question is indeed a mortgage transaction or not. As already observed some of the transactions in which the right of redemption is said to vest are not mortgage transactions but sales or charges over land.¹⁵ These other transaction may not strictly falls under a category entitled to relief based on equity inherent in transactions in the nature of mortgages.

The equitable right to redeem is the right conferred on the mortgagor by equity to redeem the mortgage at any time after the contractual date.¹⁶ This equitable doctrine which has its roots at common law is not given by the terms of the agreement, but by equity. As a result parties could not do away with it by contracting that the mortgage shall be irredeemable. The right of redemption was available even before the enactment of the Land Act, 1999. Its application was based on the application of the received rules of

¹⁵ Equity has looked at the intention of the parties and not necessarily forms to establish whether a transaction is a mortgage or not.

¹⁶ M & W p. 1174.

common law and the doctrine of equity in the country. The doctrine is now legislated. It was included under the Land Act, 1999¹⁷ and retained after the substitution of the entire Part X (Mortgage) of the Land Act, 1999 by the Land (Amendment) Act, 2004.¹⁸

Section 121 (1) of the Land Act, 1999 states “subject to the provisions of this section and section 136, on payment of all moneys and the performance of all other conditions and obligations secured by the mortgage, the mortgagee shall at the request and cost of the mortgagor discharge the mortgage at any time...” This is a wide provision which provides for the possibility of redeeming a mortgage not only before the contractual date, but afterward as well. The spirit of the doctrine of the equity of redemption is also reflected under section 116 (1) which on default confers powers and remedies on the mortgagee but subject to the right of redemption. Now parties may peg their arguments on the exercise of the equity of redemption both in law and equity.

The equity of redemption is inviolable. The applicable maxim is “once a mortgage, always a mortgage” or “a mortgage can not be made irredeemable”. It means once it is established that parties intended to create a mortgage, any stipulation in the mortgage instrument which has the effect of interfering with the mortgagor’s right to redeem is unsustainable. The following principles are provided for under section 121 (1) of the Land Act, 1999:

¹⁷ See s. 120 of the Land Act, 1999 (original text)

¹⁸ Act No. 2 of 2004.

(1) The mortgage must not be irredeemable.

This principle is provided for under paragraph (a) of section 121 (1). The provision states in effect that any agreement or provision in the mortgage instrument or otherwise which purports to deprive the mortgagor of the right to redeem shall be void. The provision simply stresses the well established principle, once a mortgage always a mortgage. It facilitates the possibility of the mortgagor redeeming the mortgaged land at any time after the contractual date despite the stipulations in the mortgage instrument which vest an absolute interest of the mortgaged land in the mortgagee on default.

At common law, the application of the principle reflected under paragraph (a) of section 121 (1) has been the subject of several decided cases. The principles enunciated are useful for our purpose. The decided cases reveal the fact that a verification of the nature of the transaction so as to determine whether it is a mortgage or not is primary. The court applying the rules of equity concluded that the test of a mortgage was in substance not form and therefore they would allow the mortgagor to redeem despite stipulations to the contrary. The application of the principle was amply clarified in *Samuel v Jarrah Timber*.¹⁹

The House of Lords after concluding that the transaction was a mortgage with an option to purchase stated once it was established that a transaction was a mortgage transaction, the mortgagee would have the mortgagee's rights and the mortgagor, his rights. The court clarified the application of the doctrine "once a mortgage, always a mortgage". It stated the doctrine meant that no contract between a mortgagor and mortgagee made at the time

¹⁹ [1904] AC 323.

of the mortgage and as part of the mortgage transaction, or, in other words, as one of the terms of the loan, could be valid if it prevented the mortgagor from getting back his property on paying off what was due on security. Any bargain which had that effect was invalid, and was inconsistent with the transaction being a mortgage.²⁰

Earlier on the House of Lords in *Salt v Marquess of Northampton*²¹ clarified the position in regard to the agreement in the mortgage which had the effect of making the mortgage not redeemable. In this case there was a mortgage of an insurance policy with a provision to the effect that in case of the mortgagor's failure to pay the debt during his life time the policy would belong to the mortgagee. It was held that the mortgage could not be made irredeemable.²² The conclusion reached seems an attempt to undermine the principle of sanctity of contract by holding that the parties of their free will could not stipulate terms which would put an end to the mortgagor's right to redeem. Moreover under section 121 (1) (a) of the Land Act, 1999 there is a statutory as well as equitable grounds for holding these stipulations to be illegal.

(2) There must not be a clog or fetter on the equity of redemption.

A clog or fetter is a repugnant condition in a mortgage. It is a provision inserted to prevent redemption on payment of the debt or performance of the obligation for which

²⁰ See p. 329. It can be noted that Lord Macnaghten in *Samuel v Jarrah Timber* stressed the fact that the offending condition or covenant must have been included at the time in which the mortgage was made. See also *Fairclough v Swan Brewery Company Ltd* [1912] AC 565 at 570 This is supported by *Reeve v Lisle* [1902] AC 461 in which the option to purchase the equity of redemption was valid because the option was not part of the original mortgage transaction, but was included later. However, the principle in *Reeve v Lisle* may not be relevant in the country because of section 121 (1) of the Land Act, 1999. That provision is widely flamed to include stipulation in the mortgage instrument or otherwise.

²¹ [1892] AC 1.

²² See also *Noakes v Rice* [1902] AC 24 at 33.

the security was given.²³ In its historical development, the relief based on the doctrine was afforded to the mortgagor by equity. Equity would afford the mortgagor the right to redeem on payment of the principal, interest and costs despite terms in the contract to the contrary. The doctrine is rooted in the same doctrine “once a mortgage always a mortgage”. It overrules and disregards clear terms of the contract.²⁴ The principle is provided for under paragraph (b) of section 121 (1) of the Land Act, 1999. As a result if the obligation under the mortgage is payment of a debt, the security is redeemable on the payment of the debt despite a clog or fetter in the mortgage.²⁵ Similarly, if the obligation is performance of a condition, the mortgage is redeemable upon performance of that condition.

(3) There shall not be a collateral advantage which is unfair and unconscionable or inconsistent with the right of redemption.

A collateral advantage has the effect of giving the mortgagee advantages, benefits or power over the mortgagor in addition to those ordinarily provided for in the mortgage.²⁶

For a long time at common law, the mortgagee could not stipulate for a collateral advantage. But the position was altered and the established position is that collateral

²³ In *Santley v Wilde* [1899] 2 Ch. 474 at 475, a clog or fetter was described as something which is inconsistent with the idea of security. Examples of repugnant conditions given are when someone conveys land in fee subject to a condition forbidding alienation, or gives a mortgage on a condition that it shall not be redeemed. Another example is in *Salt v Marquess of Northampton* [1892] AC 1 at 19 described as a situation where the mortgagee advances money at 5 per cent. payable in six months with a proviso that if not paid in six months the right of redemption should not be exercised except on payment of 6 per cent. interest.

²⁴ *Biggs v Hoddinott* [1898] 2 Ch 307 at 314.

²⁵ *Santley v Wilde* [1899] 2 Ch. 474 at 475.

²⁶ A collateral advantage may be stipulated in a covenant in the mortgage deed or otherwise. For instance a stipulation which requires the mortgagor (borrower) to purchase goods only from the mortgagee or his agent.

advantages may be stipulated by the mortgagee provided they are not unfair, or oppressive, or unconscionable or have the effect of clogging the right to redeem.²⁷

Stipulation for collateral advantages is provided for under paragraph (c) section 121 (1) of the Land Act, 1999. That paragraph provides that any provision in the mortgage instrument or otherwise which stipulates for a collateral advantage which is unfair and unconscionable and inconsistent with the right to discharge shall be void. The wording of the paragraph imports the need to satisfy the three elements in total and not in the alternative. That is a shortcoming because in effect the provision is narrow unnecessarily. The purposeful approach in interpreting the paragraph would shed light on the correct purpose which the paragraph is intended to achieve. In that sense paragraph (c) of section 121 (1) should have been in alternative that is "...any provision stipulates for a collateral advantage which is unfair or unconscionable or inconsistent with the right to discharge shall be void". The application of the rules of equity will be of utmost importance in interpreting the paragraph.

(i) Validity or invalidity of the collateral advantage after redemption

Presuming that the collateral advantage is good, that is not unfair, nor unconscionable nor inconsistent with the right of discharge, the mortgagor will be bound by it. But the question arises can the mortgagee enforce a collateral advantage after redemption? The immediate reaction might be that he cannot. This reaction is based on the fact that a

²⁷ *Biggs v Hoddinott* [1898] 2 Ch 307 at 322 per Chitty L.J.; *Noakes & Co. Ltd v Rice* [1902] AC 24 at 33 per Lord Davey.

mortgage is a security for the money advanced and collateral advantages are benefits given to the mortgagee in return for the use of the money by the mortgagor.

In *Noakes & Co. v Rice*²⁸ Lord Davey summed up the position in regard to validity of collateral advantages after redemption. He observed that there are two aspects of a mortgage: firstly, a security for money advanced; and secondly, remuneration for the use of money in the form of collateral advantage.²⁹ As a result, when the mortgage is paid off the security is at an end, and, as the mortgagee is no longer kept out of his money, the remuneration to him for the use of his money is also at an end. He held therefore a collateral advantage could not survive redemption because otherwise the mortgagor would not get back his property intact and thus stipulation for collateral advantage must come to an end upon redemption.

The difficulty of stating in certain words whether a collateral advantage may survive redemption resulted in the development of a test. A correct test is whether a collateral advantage is a bargain which interferes with the right to redeem or is a mere undertaking outside and clear of the mortgage.³⁰ If a collateral advantage interferes with a right of

²⁸ [1902] AC 24 at 34.

²⁹ However, the latter aspect of mortgage in *Noakes & Co v Rice* described as remuneration for the use of the money could be used to allow its continuation after redemption. Lord Parker in *Kreglinger v New Patagonia Meat and Cold Storage Company Ltd* [1914] AC 25 at 59 was of the view that he could see no objection to a bargain by which money is advanced for three years and the borrower pays by way of remuneration or interest for the use of money a further sum payable by installments extending over five years. The assumption is, if the mortgagee agreed to lend money in consideration of a stipulation for collateral advantage which would survive redemption, and the mortgagor agreed to give the option in consideration of the loan, the stipulation is good in law.

³⁰ See *Kreglinger v New Patagonia Meat and Cold Storage Company Ltd* [1914] AC 25 at 39 per Lord Haldane, at p.59 per Lord Parker. The statement of Lord Lindley in *Bradley v Carrit* [1903] AC 253 at 274, 276 preferred in *Kreglinger case* where he stated that as far as the covenant disputed did not form part of the terms of the security could survive redemption. Note the contradictory view as per Lord Davey at p. 266.

redemption it could not endure the redemption, but if it is a mere undertaking which is clear and outside of the mortgage, then it could survive redemption.

6.2.2.1 The termination of the equity of redemption

The equity of redemption may be terminated by sale of the mortgaged land by the mortgagee in the exercise of the power of sale.³¹ The equity of redemption can also be terminated by limitation where the mortgagor fails to redeem the land within twelve years.³² And before the enactment of the Land Act, 1999, the equity of redemption could also be extinguished by an action for foreclosure. The action for foreclosure was abolished by section 125 (1) of the Land Act, 1999.³³

6.3 Rights of mortgagee

A mortgagee has several legal and equitable rights under the mortgage. Probably the most important one is his power of enforcing the mortgage or exercising the remedies under a mortgage upon default by the mortgagor. The exercise of this power is discussed in detail in Chapters Seven and Eight.

Some of the rights are implied in a mortgage, while others are available only if they were included in the mortgage deed. It is important to look at the right of the mortgagee in regard to the original mortgagor and mortgagee, and when the mortgage was transferred

³¹ See Chapter Eight, part 8.10.

³² See item 17 of the First Schedule of the Law of Limitation Act, 1971.

³³ See Chapter Seven, part 7.10.

to a third party. As a result, it is imperative that we investigate incidents related to the transfer of mortgages.

In principle the mortgagee has the right of possession of the mortgaged land as a right and not as a remedy for default because he has a legal term (estate) of years in the property.³⁴ But in practice, he rarely exercises this power. The legal limitations would require the mortgagee in possession to account for the profit which accrued to him while in possession. Besides, business convenience makes entering into possession unrealistic. As a result the mortgagor is normally left in possession of the mortgaged property. The right of the mortgagee to enter into possession is discussed in detail in Chapter Seven, part 7.

6.3.1 Right to consolidate

Consolidation is the situation where a mortgagee in whom two or more mortgages of different lands are vested refuses to allow one mortgage to be redeemed unless the others are also redeemed.³⁵ Different circumstances may prompt the mortgagee to exercise this power. It may happen when the value of one mortgaged land (land A) has fallen to the point that it may not satisfy the debt if the other mortgages (mortgaged land B) are redeemed. In case the mortgagor wants to redeem mortgaged land B, the mortgagee can consolidate the mortgages. The mortgagor would have to redeem both mortgages.³⁶

³⁴ See *Four-Maids Ltd v Dudley Marshall Properties Ltd* [1957] Ch 317.

³⁵ M & W p. 1217.

³⁶ M & W p. 1217.

Section 119 of the Land Act, 1999 reads as follows:

- (1) Unless there is an express provision to the contrary clearly set out in the mortgage instrument, where a mortgagee has more than one mortgage from a single mortgagor, the mortgagor may discharge any or some of the mortgages without having to redeem all mortgages.

In practice, once the right of consolidation is included in the mortgage, the mortgagee must apply to the registrar to have the right recorded in the appropriate register.³⁷ Failure to register the right of consolidation will make it impossible for the mortgagee to defeat the rights of any person in occupation or use of the right of occupancy or lease. Similarly, failure to register the right of consolidation may act in favour of any person whose interest over the land was acquired before the recording of the right to consolidate in the prescribed register.³⁸

It can be noted that under section 119 (1) consolidation is possible only if the power to consolidate is stipulated clearly in the mortgage deed. The provision also stresses the fact that the mortgagee can consolidate mortgages from the same mortgagor and not otherwise.³⁹ The immediate question is who is the same mortgagor for the purpose of consolidation? For instance, if A executes a mortgage in favour of C and then B a trustee for A executes a mortgage to C, can C consolidate the two mortgages? Or if X executes a mortgage to Z, then X and Y jointly create a mortgage to Z, are X and Y the same

³⁷ s. 119 (2) of the Land Act, 1999.

³⁸ s. 119 (3) of the Land Act, 1999. Note s. 61 of the Land Registration Ordinance (Cap. 334) for the mortgages registered in the land register.

³⁹ Also see *Cummins v Fletcher* (1888) 14 Ch. D. 699 at 710.

mortgagor? The Land Act, 1999 does not clarify this issue, nor do Tanzanian cases but some common law cases do.⁴⁰

In *Sharp v Pickards*⁴¹ the plaintiff was an assignee of the equity of redemptions in three different properties mortgaged to the respondent. The plaintiff then acquired another property which he leased to C who later mortgaged it to the respondent. C assigned his equity of redemption to the plaintiff. The respondent tried to consolidate the mortgage which was executed by C and of which the equity of redemption was assigned to the plaintiff, with the other plaintiff's mortgages. It was held that the right to consolidate can only arise when all the mortgages were originally made by the same mortgagor. In this case even if equities of redemption came to be vested in the same mortgagor, the mortgagee could not consolidate the mortgages.⁴² Furthermore, if a mortgagor executes a mortgage to T, and then jointly with another person executes a mortgage to T, there can be no consolidation.⁴³

The right to consolidate is a mortgagee's power, and as such can only be exercised if both mortgages are vested on him.⁴⁴ There can be no consolidation if one mortgage is vested in him and the other in another person or jointly with another person.

⁴⁰ I am not aware of any Tanzanian case which clarifies this matter.

⁴¹ [1909] 1 Ch. 109 at 114.

⁴² Note *Vint v Padget* 2 De G. & J. 611 quoted in *Sharp v Pickards* [1909] 1 Ch. 109 at 113 in which it was held that where the equities of redemption of two estates mortgaged to different person were vested in the same person by the same deed, and the mortgages afterwards came into the hands of the same mortgagee, he had the right of consolidation against the owner of equity of redemption in both.

⁴³ See *Cummins v Fletcher* (1880) 14 Ch. D. 699; also *In re Raggett* (1880) 16 Ch. D. 117 at 119.

⁴⁴ Note s. 119 (1) of the Land Act, 1999.

In its original application, the right of consolidation was an equitable doctrine exercisable, among others, between the same mortgagor and mortgagee and after the passing of the contractual dates of the mortgages subjects of consolidation. This was stated in *Cummins v Fletcher*⁴⁵ where Cotton L. J. stated “in order to enable the mortgagee to bring an action and consolidate there must be two debts due, there must be two estates in respect of which there is only an equitable right in the debtor to redeem or claim them back...” As such the court under equitable consideration thought it would be inequitable to allow the mortgagor to redeem from the mortgagee a sufficient estate and leave him with an insufficient estate as a security for a different debt. This is the main reason behind consolidation.

As already observed, the right of consolidation is now a creature of statute as it is provided for under the Land Act, 1999. However, the Land Act, 1999 re-enacted the doctrine stating that the rules of equity applicable to consolidation do not apply.⁴⁶ One may wonder, by excluding the rules of equity under which the doctrine originates, what purpose the provision is trying to save. Is it trying to widen the rules by creating a possibility of consolidation even before the contractual date? Most likely.

The right to consolidate under the Land Act is possible only between the same mortgagee and mortgagor as was the case on its original application. But the law does not state whether mortgages can be consolidated only after the passing of the contractual dates of both mortgages. Restricting the right to consolidate to mortgages which are due will

⁴⁵ (1888) 14 Ch. D. 699 at 708; 712.

⁴⁶ s. 119 (4) of the Land Act, 1999.

defeat the purpose which consolidation is intended to serve that is, to address a possible inequality where the mortgagor redeems the sufficient mortgage and leaves the mortgagee with insufficient. This will mean the mortgagee should be able to consolidate a mortgage which is due with the one which is not due. The possibility will be a relief to lenders in possession of undervalued security or property which has depreciated.

6.3.2 Right to tack

Tacking occurs when the mortgagee at a later date lends more money to the mortgagor on the same security.⁴⁷ It is a special right giving the mortgagor and the mortgagee alike the flexibility of using the same mortgage as a security for future advances (lending facility). If the mortgagor needs more money in the future, the right to tack will allow the mortgagee to increase the debt on the same security. Section 118 of the Land Act, 1999 provides for the right to tack. It reads:

- (1) A mortgagee may, subject to the provisions of this section, make provision in the mortgage instrument to give further advances or to give credit to the borrower on a current or continuing account.

From the above provision, the right to tack is exercisable only if it is provided for in the mortgage instrument. Otherwise there is no right to tack.⁴⁸ The mortgagee whose mortgage creates a right to tack has a duty to apply to the registrar to have the right recorded in the land register otherwise the right may not be exercisable if its exercise will

⁴⁷ M & W p. 1283.

⁴⁸ s. 118 (3) of the Land Act, 1999.

prejudice the interest of any subsequent mortgagor whose mortgage was registered prior to the inscription of such right in the land register. In any case if the right to tack is included in the mortgage, the deed may contain a clause stating that “the security covers any further advance which the mortgagee may give” or words to similar effect.

The act of tacking impacts on the priority of mortgages created.⁴⁹ The question of priority of mortgages arises where there is an intervening mortgage or mortgages between the first mortgage and further advances. The law provides that a further advance will not have priority to any subsequent mortgage unless the provision for further advances is noted in the register in which the mortgage is registered.⁵⁰ In the alternative, if the provision for further advance is not noted in the register, it will rank in priority to any subsequent mortgages if the subsequent mortgagee has consented in writing to the priority of the further advance.⁵¹

However, it is provided by law that where a mortgage provides for the payment of the principal sum by way of installments, the payment of those installments shall not be taken to be further advances and therefore such payment shall have priority to all subsequent mortgages.⁵² The provision simply tries to cast out doubt where the loan is made by installment. The provision creates room for controversy because the provision may also import an assumption that, if the mortgage does not provide for payment of the

⁴⁹ See part 6.6 below.

⁵⁰ s. 118 (2) (a) of the Land Act, 1999.

⁵¹ s. 118 (2) (b) of the Land Act, 1999; s. 60 (1) of Land Registration Ordinance (Cap. 334). Note that reference to “subsequent mortgagor” under section 118 (2) (b) of the Land Act, 1999 should read “subsequent mortgagee”. See section 117 (2) (b) of the Land Act, 1999 (original text).

⁵² s. 118 (4) of the Land Act, 1999.

principal sum by installment, but nevertheless the mortgagee advances the money by installments those payments should not be taken as further advances and hence subject to the rules in regard to the right to tack. In this latter scenario, payment by installment will be imputed to the agreed principal sum.

6.4 Variation of mortgages

The mortgagee and the mortgagor alike may wish to change or vary the terms of the mortgage. The need for variation may be a result of a change in social, economic or business conditions which may make the observance of mortgage terms a burden. Therefore, parties may agree to vary the mortgage. The Land Act, 1999 provides that variations in a mortgage must be in writing, the memorandum of which must be signed by both the mortgagor and the mortgagee signifying their consents to the variation.⁵³ Once the memorandum is signed, it must be endorsed or annexed to the mortgage instrument.⁵⁴ After it has been endorsed or annexed as the case may be, the memorandum is deemed to have varied the mortgage.⁵⁵

It is important to note the time when the variation takes effect. Subsection 120 (3) of the Land Act, 1999 provides that the covenants, conditions and powers expressed or implied in a mortgage shall take effect as regards the mortgage so varied from the time of variation. Subsection (2) (b) which requires the memorandum to vary the mortgage to be signed by the mortgagor and mortgagee, is complemented by conditions under subsection

⁵³ s. 120 (2) (b) of the Land Act, 1999.

⁵⁴ s. 120 (4) (a) of the Land Act, 1999.

⁵⁵ s. 120 (4) (b) of the Land Act, 1999.

(4), that is, to annex or endorse the signed memorandum to the mortgage deed. So the time of variation as referred to under subsection (3) starts after the annexation or endorsement of the memorandum to the mortgage.

We must note subsection (1) of section 120 of the Land Act, 1999 the provision which explains the exercise of the power to vary the rate of interest payable. It provides that “the mortgagee shall not vary the rate of interest payable under a mortgage without giving notice of such variation to the mortgagor.”⁵⁶ The provision is worded in a negative sense. It does not give a mortgagee the power to vary the interest rates, but directs the manner of exercise of such power if any. The power to vary the rates of interest must therefore be included in the mortgage deed. The power to vary interest rates if ill exercised will defeat commercial sense. This is because the mortgagor would certainly want to be certain of the rate of interest payable. To protect himself the mortgagor would have to make sure that the power to vary the rate of interest if included in the mortgage deed is well clarified such as subject to a certain ceiling or exercised only on a special occasion.

6.5 Transfer of interests under mortgage

A party to a mortgage by agreement may wish to transfer the mortgage to another person. The mortgagee may wish to transfer the mortgage in the sense of the debt (as an asset) either in whole or in part, or the mortgaged land as a security for the debt. On the other

⁵⁶ I am not aware of any prescribed form to be used to give notice of variation of interest rate. An informal notice will suffice.

hand, the mortgagor may want to transfer the mortgaged land or the liability to pay the debt by assigning the equity of redemption to another person. In both cases, it is necessary to discuss the possibilities and limitations imposed by the law. It is also important to analyze the relationship of the parties that is between the assignee or transferee of the equity of redemption and the mortgagee, or between the transferee of the mortgage and the mortgagor, or when both the mortgagor and the mortgagee transfers between the assignee of the equity of redemption and the transferee of the mortgage respectively.

Transfer is defined to mean the act of passing of a right of occupancy, a lease or a mortgage from one party to another by act of the parties and not by operation of the law.⁵⁷ The person to whom the transfer is made is called the transferee, while the person who makes the transfer is referred to as the transferor. As noted from the foregoing definition, the act of passing a mortgage from one party to another may be a result of the operation of the law. This form of passing of mortgage known as transmission, takes place on death or insolvency of a party to the mortgage or more event otherwise necessitating the estate in question to devolve onto another person. Transmission is discussed in brief below.⁵⁸

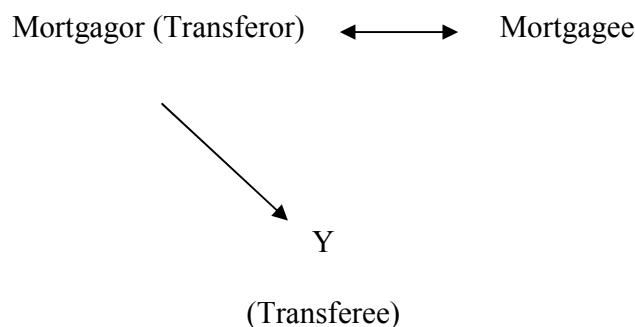
⁵⁷ See the definition section of the Land Act, 1999.

⁵⁸ See part 6.5.3 below.

6.5.1 Transfer of equity of redemption inter vivos

The mortgagor may wish to transfer the mortgaged land either free from the mortgage or subject to the mortgage. The mortgagor may transfer the mortgaged land free from the mortgage if he redeems the land. If not he may still transfer the land free from the mortgage with the mortgagee's consent for some other arrangement. At common law, he may invoke section 50 (1) and (2) of Law of Property Act, 1925 by asking the court to declare the land free from the mortgage after paying the money owed into court.⁵⁹ Otherwise, he transfers the mortgaged land subject to the mortgage.

At common law, a mortgagor could convey the land or property subject to the mortgage at any time with or without the consent of the mortgagee.⁶⁰ The transfer is illustrated in the following illustration.



When he does transfer, the mortgagor (the transferor) still remains liable to pay the money due under the mortgage.⁶¹ The mortgagor has to obtain a covenant from the transferee to pay the mortgage and indemnity in case he is sued on the covenant with the

⁵⁹ M & W p. 1257.

⁶⁰ M & W p. 1257.

⁶¹ For the personal liability of the mortgagor to pay the money, see Chapter Seven, part 7.9.

mortgagee. However, the mortgagee may choose to proceed against the mortgage and abstain from suing the mortgagor. But if he decides to sue the mortgagor on the covenant to pay the money, upon payment by the mortgagor, the mortgagee has to re-convey the land to the mortgagor subject to the equity of redemption vested in any other person.⁶² To protect himself against the risk, the mortgagor needs to extract a covenant from the transferee of indemnity and that the transferee will pay the mortgage off.⁶³

The assignee or transferee of the equity of redemption in the absence of a covenant is not personally liable to the mortgagee or his transferee. However, in principle he steps into the position of the mortgagor and may have to pay the principal sum plus interest so as to protect the land from foreclosure⁶⁴ or an action by the mortgagee which would have the effect of extinguishing the right of redemption.

Before the enactment of the Land Act, 1999, the common law position on transfer of the equity of redemption was applicable in the country by virtue of section 2 (2) of the Land (Law of Property and Conveyancing) Ordinance (Cap. 114). This means the mortgagor could transfer or assign the mortgaged land. He could also transfer or assign the equity of redemption.⁶⁵

The Land Act, 1999 does not contain express provision in regard to the transfer of mortgaged land or an equity of redemption. However, the power to transfer the

⁶² *Kinnaird v Trollope* (1888) 39 Ch.D. 636 at 643.

⁶³ *Mills v United Counties Bank Ltd* [1912] 1 Ch 231.

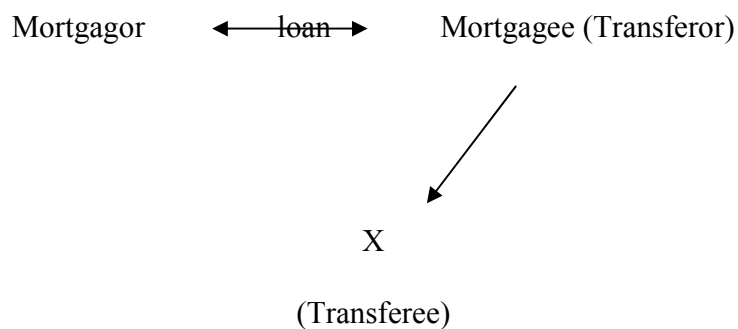
⁶⁴ *In re Errington* [1894] 1 Q.B. 11 at 13, 14. The action for foreclosure was abolished in Tanzania by s. 125 (1) of the Land Act, 1999.

⁶⁵ Note s. 50 of Cap. 334.

mortgaged land can first be inferred from section 124 (1) (g) of the Land Act, 1999 and secondly from the general principles of law. The mortgagor after executing a mortgage is entitled to the equity of redemption. It is the right to have the property reconveyed on performance of the conditions on which the mortgage is given. The equity of redemption is an interest in land which can be dealt with. In both cases what is needed is the consent of the mortgagee in writing before the mortgagor could transfer and the law directs that the consent of the mortgagee should not be unreasonably withheld.⁶⁶

6.5.2 Transfer of the mortgage by the mortgagee

At common law, a mortgagee can transfer the mortgage either absolutely or by way of sub-mortgage and he may exercise his power with or without the consent of the mortgagor.⁶⁷ The transfer is shown in the following illustration.



Despite this power, in practice, it is important that the mortgagor become a party in the transfer so that he can acknowledge the representation of the mortgagee (transferor) to

⁶⁶ s. 124 (1) (g) of the Land Act, 1999.

⁶⁷ F & L p. 263.

the transferee.⁶⁸ If not made a party, the transferee will get the benefit of the sum actually due even if the mortgagee had represented that more money was owed.⁶⁹ The position was eloquently explained in *Turner v Smith*,⁷⁰ where it was stated that, where a mortgage is transferred without the privity of the mortgagor, the transferee takes subject to the state of account between the mortgagor and mortgagee at the time of transfer. In addition, in the absence of collusion, if the mortgagor without the notice of the transfer pays the mortgagee, the payment will be allowed to the mortgagor as against the transferee.⁷¹ This reality necessitates the need of the mortgagor to be made a party in the transfer. In case the mortgagor was not made a party or informed of the transfer, the transferee has to inform him so that he knows to whom to pay the money.⁷²

The transfer of the mortgage passes the debt, a security for the debt and other interest of the mortgagee subject to the equity of redemption.⁷³ The transferee would be bound by the covenants between the mortgagee and the mortgagor. He is also not in a better position compared to that of the transferor.⁷⁴

Before the enactment of the Land Act, 1999, the common law position on transfer of the mortgage by the mortgagee was applicable in the country. This means the mortgagee could transfer the mortgage to another party with or without the consent of the mortgagor. Again the Land Act, 1999 is silent on the transfer of a mortgage by a

⁶⁸ F & L p. 263, also M & W p. 1258.

⁶⁹ M & W p. 1258.

⁷⁰ [1901] 1 Ch. 213 at 219. See also *De Lisle v Union Bank of Scotland* [1914] 1 Ch. 22 at 31; *Parker v Jackson* [1936] 2 All ER 281 at 284.

⁷¹ At 219.

⁷² F & L p. 263.

⁷³ F & L p. 264.

⁷⁴ *Turner v Smith* [1901] 1 Ch 213 at 220.

mortgagee. The Act does not say whether the mortgagee can or can not transfer the mortgage.⁷⁵ The general principles of the law apply. A mortgage is an interest which is transferable. In addition, a debt as an asset can be transferred or assigned.⁷⁶

6.5.2.1 A particular instance of transfer by the mortgagee

There is a particular instance of the transfer of the mortgage initiated by the mortgagor or some other person. It is a form of transfer which was not common before the enactment of the Land Act, 1999. This form of transfer can take place only if the mortgagee is not in possession of the mortgaged land. To initiate the transfer, the mortgagor must, in writing request the mortgagee to transfer the mortgage to a person named in the written request. Section 122 of the Land Act, 1999 reads:

- (1) The current mortgagor or any person mentioned in subsection (2) may at any time, other than a time when the mortgagee is in possession of the mortgaged land, in writing request the mortgagee to transfer the mortgage to a person named in the written request.

It is the mortgagee who transfers at the initiative of the mortgagor or some other person. Subsection (2) names other persons who can initiate the transfer of the mortgage. It lists:

- (a) any person who has an interest in the right of occupancy, lease or mortgage that has been mortgaged; or

⁷⁵ s. 122 of the Land Act, 1999 does not apply under this head because s. 122 concerns a transfer by the mortgagee not on his own wish but the one which has been initiated by the mortgagor or some other persons.

⁷⁶ See F & L p. 124.

(b) any surety for the payment of the amount secured by the mortgage; or

(c) any creditor of the mortgagor who has obtained a decree for sale of the mortgaged right of occupancy, lease or mortgage.

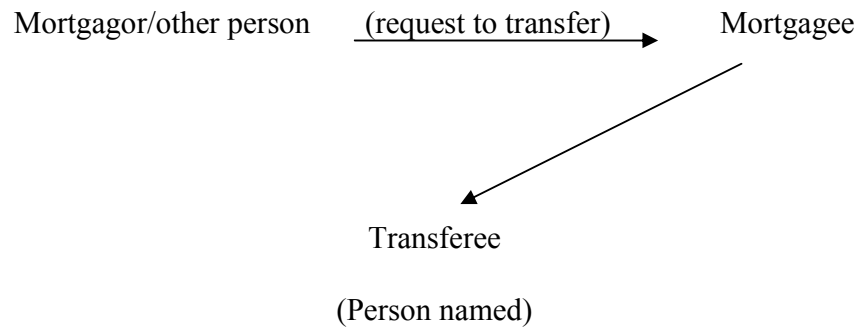
The persons named must first seek and obtain the consent of the mortgagor before they can request the mortgagee to transfer the mortgage and the law directs that the consent should not be unreasonably withheld.

Section 122 of the Land Act, 1999 envisages the transfer of the mortgage from the mortgagee to another person. The transfer has the effect of freeing or discharging the mortgage from the mortgagee as the transfer takes place after the mortgagee has been paid all monies payable and the performance of all other obligations secured by the mortgage.⁷⁷ If the transfer is initiated by any person such as any creditor of the mortgagor,⁷⁸ the transferee gets the mortgage free from the mortgagee's interest and will therefore step into the shoes of the mortgagee.

After receiving the written request and when the conditions contained under subsection (3) are complied with, the mortgagee must transfer the mortgage. The transfer is illustrated as follows:

⁷⁷ s. 122 (3) of the Land Act, 1999.

⁷⁸ Note s. 122 (2) (c) of the Land Act, 1999.



6.5.2.2 Sub-mortgages

A sub-mortgage is a mortgage of a mortgage.⁷⁹ It is a practice which enables the mortgagee to use a mortgage as a security for money he borrows.⁸⁰ The mortgagee would therefore transfer the mortgage subject to redemption with a covenant to pay the sum advanced plus interest. A sub-mortgage transfers only part of the debt to sub-mortgagee.

At common law, the effect of a sub-mortgage is to put the sub-mortgagee in the position of the transferee of the mortgage hence entitled to exercise rights under the principal mortgage.⁸¹ For instance, he may exercise a power of sale under the principal mortgage thereafter extinguishing the rights of redemption both under the principal mortgage and the sub-mortgage. Alternatively, he may exercise rights under sub-mortgages such as a sale of the mortgage debt and the security on default by the mortgagee.⁸²

⁷⁹ F & L p. 272.

⁸⁰ See *In re Tahiti Cotton Company, Ex parte Sargent* (1874) LR 17 Eq 273 at 279, also considered in *France v Clark* (1888) 22 Ch. 830 at 834.

⁸¹ F & L p. 273.

⁸² F & L p. 273.

As already observed, the power of transfer of the mortgage by the mortgagee is not expressly provided for under the Land Act, 1999. But the mortgagee has implied rights to transfer and hence can transfer the mortgage by way of sub-mortgage. Therefore, unless otherwise stated in the mortgage deed, the mortgagee may use the mortgage as a security for the advance to him or may borrow by re-depositing a certificate of title deposited to him as a security. In both cases, it is important that the mortgagor is given notice of the transaction.

6.5.3 Transfer by operation of law (transmission)

A mortgage of the registered land may devolve on the mortgagee's legal representative upon the death of the mortgagee. The same applies to the equity of redemption which upon the death of the mortgagor devolves to his legal representatives. The position is that the person to whom the estate devolves must apply to the relevant register to have the mortgage or the interest in the land as the case may be registered in his name.⁸³

The provisions for the devolution of estates are provided for under the Land Registration Ordinance (Cap. 334). Section 67 provides in effect that on the death of the owner of any estate or interest, his legal personal representatives on application to the Registrar shall be entitled to be registered as owner in the place of the deceased. After being registered as the owner, the legal representatives may dispose of the mortgage as an estate of the deceased, or deal with it in the market.

⁸³ *Farah Mohamed v Fatuma Abdallah* [1992] TLR 205. See also s. 80 (1) of Cap. 334.

A different scenario arises in case of co-ownership of an estate. It is provided for under section 69 (1) that if there are more than one joint owners of the estate and one dies, his name shall be deleted from the land register on the application of any interested person. The presumption is if the interest in land is owned jointly by joint occupiers, on the death of one joint occupier, the interest will devolve to surviving joint owner. The joint owner will therefore be entitled to apply as an interested person and be registered forthwith as an absolute owner of an estate. Alternatively, if the interest is owned by occupiers in common, on the death of one occupier his legal representatives will be entitled to apply to be substituted thereto.⁸⁴ In general the rules of co-occupation or co-ownership apply.

6.5.3.1 Devolution by bankruptcy

The mortgage or equity of redemption may also devolve if the mortgagee or the mortgagor respectively becomes legally incapacitated through bankruptcy or insolvency. When a person is adjudged bankrupt, all his property and rights vest in the official receiver or trustee.⁸⁵ The official receiver may need to serve on the Registrar a copy of the adjudication order and thereupon will be entitled to be registered as owner of that estate or interest.⁸⁶ In case the person responsible to oversee the estate of the person adjudged bankrupt is a trustee, he may be required to serve a copy of the certificate of appointment and then will be entitled to be registered as the owner of that estate or interest.⁸⁷ In the like manner, on the devolution of the company, all its properties and

⁸⁴ See s. 159 of the Land Act, 1999.

⁸⁵ s. 75 (1) of Cap. 334. Also see s. 80 (2).

⁸⁶ s. 75 (2) of Cap. 334.

⁸⁷ s. 75 (3) of Cap. 334.

rights vest in the liquidator of the company.⁸⁸ The liquidator once appointed is entitled to apply to the registrar to be registered as owner of the estate or interest.⁸⁹

6.5.4 Registration of a transferred mortgage

In this part, we will discuss the requirement of the need to register on the relevant register a transfer of a mortgage. The discussion in this part focuses on registration of the transfer and not registration as a result of transmission. The requirements for the registration of the passing of an interest by operation of law have already been mentioned in parts 6.5.3 and 6.5.3.1. Besides, the rules regulating transfer by operation of law in general are not necessarily provided for under the Land Act, 1999.

It must be noted that after a transfer of the mortgage by the mortgagee or a transfer of the equity of redemption by the mortgagor, the transferee must apply to the relevant register for the registration of his interest. The transfer of a mortgage or equity of redemption is governed by the rules regarding dispositions of interests in land.

As seen above, transfer is the passing by agreement of the right of occupancy, a lease or a mortgage from one person to another. The passing of the mortgage by the mortgagee to another person is an act of transfer.⁹⁰ In connection to that, transfer of a mortgage is a

⁸⁸ See s. 190 of the Companies Ordinance (Cap. 212) on the power of liquidator.

⁸⁹ s. 76 of Cap. 334. See also Part VI of the Companies Ordinance Cap (212); F & L p. 271.

⁹⁰ The passing of the mortgage from the mortgagee or mortgagor to another party may be due to an act of transfer or transmission.

disposition.⁹¹ This triggers the application of Part VIII, sub-part I of the Land Act, 1999 which regulates dispositions affecting land. The notable provision is section 61 (1). It provides to the effect that no mortgage shall be capable of being disposed of except in accordance with the Land Act and thus any attempt to dispose of the mortgage otherwise than in accordance with the Land Act, shall be ineffectual to transfer or affect etc any right or interest in land, or in the right of occupancy, lease or mortgage.

As a result, apart from other requirements such as the need for writing in effecting the contract of transfer of a mortgage in compliance with section 64 (1) of the Land Act, 1999, there is a need for registration of the transfer. Section 62 (2) provides in effect that no instrument effecting any disposition shall operate to transfer any mortgage until it has been registered in accordance with the laws relating to registration of instruments affecting the land in respect of which the disposition has been made.

Registration of a transfer is important as failure to register may defeat the whole purpose of the transfer.⁹² In addition, inscription in the register of the fact of transfer will serve as a notice to anyone who inquires about the status of an estate.

6.6 Priority of mortgages

It is important to determine the question of priority of mortgages or charges created over land. When a mortgagor has created several mortgages over the property sometimes well

⁹¹ The Land Act, 1999 define disposition to include transfer, see the definition section of the Act.

⁹² See Chapter Five, part 5.6.3.1 above for the effects of non-registration of a mortgage (disposition).

above the value of the property, questions will arise as to which mortgage or mortgages has priority. The issue of priority is pressing especially when the value of the mortgaged land (security) depreciates leaving the mortgagees with a property of which the value is not enough to satisfy all the debts.

The determination of the ranking of mortgages becomes relevant when the mortgagees want to enforce the mortgages.⁹³ The question is how the mortgages rank when the mortgagor creates several mortgages to the same or different mortgagees? The position differs in regard to the mortgages registered in the land register that is ordinary mortgages and for mortgages registered in the register of documents or village registers, in this case informal mortgages and customary mortgages respectively.

6.6.1 Priority of ordinary (formal) mortgages

We have seen in Chapter Five, part 5.6.3 above that the law requires registration of mortgages or charges created over land.⁹⁴ Mortgages once registered are incumbrances which run with the lands. Section 117 of the Land Act, 1999 provides that:

(1) Mortgages shall rank according to the order in which they are registered-

(a) in respect of mortgages of land registered under the Land Registration Ordinance, in accordance with section 60 (1) of that ordinance;

⁹³ See Chapter Seven for the mortgagee's remedies.

⁹⁴ See ss. 62 (2) and 113 (4) of the Land Act, 1999.

(b) in respect of all other mortgages, in accordance with the appropriate register.

As far as ordinary mortgages are concerned, one has to go back to section 60 (1) of the Land Registration Ordinance (Cap. 334). It stresses that mortgages shall rank according to the order in which they are registered and not according to the order in which they are made. The provision which in principle incorporates both section 117 (1) and 118 (1) and (2) of the Land Act, 1999 provides two exception to the general rule. First, the rule is inapplicable if a mortgage creates a right to tack further advances. If a mortgage creates a right to tack further advances, the further advances would have priority over intermediary mortgages created over the land.⁹⁵ The second exception is if the prior mortgagee agrees in writing to the priority of further advances.⁹⁶

Registration of the mortgages of registered land is an important factor in determining the priority of mortgages registered in the land register. Registration is part of the mortgage transaction.

6.6.2 Priority of informal and other form of mortgages

On the other hand, in general informal mortgages rank according to the order in which they are made.⁹⁷ This rule came with the introduction of informal mortgages as a form of mortgage by the Land Act, 1999. Section 117 (2) of the Act provides for the order under

⁹⁵ See part 6.3.2 above.

⁹⁶ s. 60 (1) of Cap. 334 become clear if read in mind of ss. 117 (1) and 118 (1) and (2) of the Land Act, 1999.

⁹⁷ s. 117 (2) of the Land Act, 1999.

which mortgages were made as a determinant of the priority of informal mortgages. It states informal mortgages shall rank according to the order in which they are made. However, the proviso to subsection (2) is to the effect that once an informal mortgage is registered under section 11 of the Registration of Documents Ordinance (Cap. 117) that registered informal mortgage shall take priority over any unregistered informal mortgages.⁹⁸

Analytically what section 117 (2) means is that if there are two or more unregistered informal mortgages, the one which was created first will have priority. However, if one is registered even if made at the later date, the registered informal mortgage will have priority. Section 117 (4) tries to clarify a situation where several informal mortgages are made on the same day. The subsection (4) is rather confusing but read with subsection (2) simply highlights the determination of priority on an hourly basis. It states to the effect that where two informal mortgages are made on the same day or are registered on the same day, the mortgage which was first in time to be made or the mortgage which was first in time to be registered shall have priority. It has the same effect as subsection (2).

Time is important to informal mortgages in the sense of determining priority whether from the order in which mortgages are made or from that of their subsequent registration. This fact makes the maxim *qui prior est tempore potior est jure*, which means he who is first in time is better in law, useful for this purpose.⁹⁹ The question of the use of time in

⁹⁸ See proviso to s. 117 (2) of the Land Act, 1999.

⁹⁹ See Burke J. (ed.) *Jowitt's Dictionary of English Law*. 2nd ed. Vol. 2. London: Sweet and Maxwell, 1977, at 1485.

determining priority was clarified in the case of *Rice v Rice*¹⁰⁰ where it was stated that time becomes important in determining the rights of the parties if upon an examination of their relative merits there is no other sufficient ground of preference between them, or, in other words, that their rights are in all other respects equal except on the ground of priority of time. It was stated further that if upon examination it is found that one has a better right than the other, priority of time is immaterial.¹⁰¹ That can be illustrated in a case of two informal mortgages X and Z herein ranked according to the order in which they were made. If mortgage Z (made late) is registered, that act of registration is a better right which would give it priority.

The rules as to priority of informal mortgages apply to customary mortgages.¹⁰² In the same manner therefore, customary mortgages rank according to the order in which they are made in the sense that if there are two unregistered customary mortgages, the one which was created first will take priority. However, where a customary mortgage is registered in the village register that registered customary mortgage shall take priority over any unregistered customary mortgage. The rules as to priority of informal mortgages apply as far as circumstances permit to liens by deposit of documents.¹⁰³

¹⁰⁰ (1854) 2 Drewry, 73 at 78; 61 ER 646 at 648.

¹⁰¹ See also *Capell v Winter* [1907] 2 Ch 376.

¹⁰² s. 117 (3) of the Land Act, 1999.

¹⁰³ s. 117 (6) of the Land Act, 1999.

6.7 Discharge of mortgages

A mortgage will normally contain a covenant to repay the principal sum with interest on a fixed date and payment of interest on default. The covenant will also explain the manner of repayment. If no date of repayment is provided in the mortgage deed, the debt is repayable on demand. After the payment of the money owed, or performance of conditions upon which the mortgage is given, the mortgagee has to discharge the mortgage.¹⁰⁴

The payment is normally made to the mortgagee, although much will depend on the terms of the mortgage. But in case the mortgagee can not be found or is under a disability and there is not a person authorized to discharge the mortgage, the mortgagor can make the payment to the Registrar for Lands under section 63 of Land Registration Ordinance (Cap. 334). The Registrar will receive the money in trust for the mortgagee or other person entitled thereof and will have to discharge the mortgage. The payment to the Registrar for Lands under section 63 applies to mortgages of land registered in the land register. Although not provided for in the relevant laws, for mortgages registered in the register of documents under section 11 of the Registration of Documents Ordinance (Cap. 117) or Registrar of companies, if the mortgagee cannot be found or is under a disability, payment may be made to the relevant registrars.¹⁰⁵

¹⁰⁴ s. 121 of the Land Act, 1999.

¹⁰⁵ Note s. 84 of the Companies Ordinance (Cap. 212) which directs the registrar to enter a memorandum of satisfaction in the register on evidence being given to him to his satisfaction that the debt for which any registered charge was given has been paid or satisfied.

Section 121 (1) of the Land Act, 1999 as amended by the Land (Amendment) Act, 2004 has streamlined the process of discharge of mortgage. Its predecessor, that is section 120 (1) of the Land Act, 1999 (original text), envisaged discharge after the contractual date hence stipulating for the right of the mortgagor to discharge before the mortgaged land had been sold.¹⁰⁶ It refers to the mortgagor discharging a mortgage. In practice the mortgagor does not discharge the mortgage, but can only fulfill the conditions of the mortgage and demand that the mortgagee discharge the mortgage. The provision also had imposed stringent conditions before the mortgagor could *discharge* before the expiry of the term of the mortgage.¹⁰⁷

The current section 121 (1) provides for the possibility of discharge at any time before, on, or after the contractual date. It provides that it is the mortgagee who discharges the mortgage. Moreover, subsection (2) abolished the stipulation in mortgages which would require the mortgagor wishing to obtain a discharge of the mortgage to pay to the mortgagee an additional amount in excess of one month's interest at the rate at which interest is payable on the principal sum secured by the mortgage.¹⁰⁸

However, in case the mortgagor fails to repay the principal sum with interest on the contractual date or thereafter, the mortgagee may be entitled to remedies afforded to him. The remedies available to the mortgagee are discussed in Chapter Seven below.

¹⁰⁶ See Chapter Eight, part 8.2 for the exercise of the power of sale.

¹⁰⁷ See s. 120 (2) of the Land Act, 1999 (original text).

¹⁰⁸ s. 121 (2) of the Land Act, 1999 has the effect of abolishing the practices under s. 120 (2) of the Land Act, 1999 (original text).

CHAPTER SEVEN

ENFORCING MORTGAGES BY THE MORTGAGEE

7.1 Introduction

A mortgage is a contract. In exchange for the money advanced, the mortgagee acquires a security and several remedies. Normally the mortgagee will have two sources of payment. He may decide to sue the mortgagor for the payment, or fall on the security. However, where there is a surety, the arrangement gives the mortgagee an extra source of payment. The mortgagee can sue the mortgagor,¹ or the surety, or fall on the mortgaged security. All these causes of actions can be exercised after default simultaneously or successively or not at all.

The power of enforcing a mortgage by the mortgagee is exercisable by taking into account some facts related to mortgage of land in the country.² One situation is the fact that sometimes the mortgagor is not actually the borrower. This is the case of a third party mortgage where the mortgagor executes a mortgage to secure a debt of the borrower. In this situation the borrower is the person who actually receives the credit facility from the bank, the bank relying on the mortgage executed by the mortgagor. This arrangement may pose some difficulties when it comes to enforcement of the mortgage because the mortgaged property which is liable is the mortgagor's while it is the borrower who is supposed to repay the money.

¹ There may difficulties where the mortgagor is not the borrower as is the case in the third party mortgages.

² See part 7.4 below.

When the need to enforce the mortgage arises, the mortgagee may decide to sue the mortgagor to effect payment. The suit will be based on the covenant to repay the money. But as far as the mortgage is concerned, because the mortgagor has executed a mortgage as a security, recourse to the mortgaged property may be desirable. Yet, if there is a shortfall after realizing the security, the mortgagee can personally proceed against the mortgagor for the deficit.

As was observed in the field research, mortgagees do not rush to exercise their remedies. This is because it is not in their interest to have recourse to the powers of enforcing the mortgage. Normally they would renegotiate the contract by coming up with terms which would make it easier for the mortgagor repay the debt. In most cases the mortgagee would afford the mortgagor more time to pay the debt.³ This may be a good practice where circumstances point to the fact that the mortgagor needs more time to pay the money or different terms of payment. But its downside is the fact that by giving the mortgagor more time to make payment that might increase his burden beyond what would otherwise be the case. One may wonder what would be the consequence to the mortgagor who is not a borrower where the borrower's burden increased as a result of this scheme. Would the changes or insertion of new terms relieve or discharge the mortgagor in third party mortgage or surety from liability, or would they be bound by the position before the changes were made?⁴ The position is not clear in Tanzania, but it seems the mortgagor in third party mortgage or surety would be bound by the new terms

³ This fact was intimated to me by officials of NBC, Tanzania Investment Bank, Standard Chartered Bank and EuraAfrican Bank during my field research.

⁴ See *Bolton v Buckenham* [1891] 1QB 278.

only if they were made party to the change. They will not be bound by the position before the change.⁵

The Land Act, 1999 mentions some remedies which are available to the mortgagee.

Section 126 states:

Where the mortgagor is in default, the mortgagee may exercise any of the following remedies –

- (a) appoint a receiver of the income of the mortgaged land;
- (b) lease the mortgaged land or where the mortgaged land is of a lease, sub-lease the land;
- (c) enter into possession of the mortgaged land; and
- (d) sell the mortgaged land, but if such mortgaged land is held under customary right of occupancy, sale shall be made to any person or group of persons referred to in section 30 of the Village Land Act, 1999.

In general, all the remedies become available to the mortgagee after default by the mortgagor. He may decide to first appoint a receiver and then sell. He may choose to enter into possession and then appoint a receiver or sell the land. As to what makes the mortgagee choose a remedy and not the other may depend on a number of circumstances.

⁵ See Chapter Six, part 6.4 for the discussion on the variations of mortgages.

Foremost, the mortgagee will choose a remedy which will guarantee a full or maximum recovery of the outstanding debt. Legal limitations and its implication may influence the choice of remedies, as may the administration costs and, probably more important, the business environment of the time. The mortgagee must make a commercial judgment as to what cause of action is likely to yield good results. One may look at things such as housing prices at the time, recession, rents etc. The exercise of each of the powers is discussed in detail below except for the power of sale which is discussed separately in Chapter Eight.

However, even before default the mortgagee may intervene to ensure the continuance of the good health of the mortgaged property. The mortgagee may intervene to stop activities which are likely to lower the value of the mortgaged property or jeopardize the mortgagor's title in the mortgaged property all together. For instance, the mortgagee may have to make sure that the mortgagor pays all rates, charges, rents, and taxes which are at all times payable in respect of the mortgaged land held for a right of occupancy.⁶ He may also have to make sure that the mortgagor repairs all buildings and other improvements upon the mortgaged land.⁷ The mortgagee may have to make sure that the mortgagor insures the buildings in the land to the full value or otherwise ensures the resources will be available to make good any loss or damage caused by fire to all buildings on the land.⁸ To make sure that the mortgagor observes these conditions, the mortgagee must extract

⁶ See s. 124 (1) (b) of the Land Act, 1999.

⁷ See s. 124 (1) (c) of the Land Act, 1999.

⁸ If the insurance is taken, the mortgagee will have to make sure that it is taken in the joint names of the mortgagor and him with the insurer approved by him. See s. 124 (1) (d) of the Land Act, 1999. Also see paragraph (e) and (h).

covenants from the mortgagor which would allow him to enter upon the mortgaged property from time to time to inspect the condition of the mortgaged property.

Where the mortgagor fails to observe these duties, the mortgagee after giving notice to the mortgagor may spend any money which is reasonably necessary to rectify the breach and may add the money so spent to the principal money secured by the mortgage.⁹

In the following parts, we will examine the remedies available to the mortgagee. We will comment on the process of creation of mortgages especially its perfection and its effect in enforcement. We will give general comments on the role of the courts in enforcement and the mechanism of execution of a court decree.

7.2 The general impact of the Land (Amendment) Act, 2004 on the enforcement of mortgages

As originally enacted, the provisions of the Land Act, 1999 on the enforcement of mortgages were very cumbersome. The provisions were unintelligible, technical, and had too many exceptions which eventually made mortgage enforcement almost impossible. The new provisions are more streamlined and less technical, though over a long time, they may not withstand the need for changes.

The then leading provision on mortgage enforcement, that is section 125, required the mortgagee to issue successive notices. The provision was confusing and difficult to

⁹ See s. 124 (1) (j) and (4) of the Land Act, 1999.

follow. It provided that where the borrower was in default and continued so to be in default for one month, then the mortgagee could serve on the borrower a notice to redress the default.¹⁰ This was not notice of the mortgagee's intention to enforce the mortgage but a warning to urge the borrower to redress the default. The notice in question was conditional. The notice had to inform the borrower of the nature and extent of the default¹¹ and if (i) the default consisted of non payment of any money due under the mortgage, the amount that had to be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default was to be completed,¹² and (ii) if the default consisted of failure to perform or observe any covenant in the mortgage, the notice had to inform him of the thing that he (borrower) was to do or abstain from doing so as to rectify the default and the time which could not be less than two months by the end of which the default had to be rectified.¹³

The mortgagee could only proceed to exercise any of the remedies after the lapse of the time specified above paying attention to specific procedural requirements under each remedy.¹⁴ As a result, it could take not less than four months before the mortgagee could move to a specific remedy. The procedure could be a lengthy one because the borrower could challenge any stage in court during the process of enforcement.

¹⁰ s. 125 (1) of the Land Act 1999 (original text).

¹¹ s. 125 (2) (a) of the Land Act 1999 (original text).

¹² s. 125 (2) (b) of the Land Act 1999 (original text).

¹³ s. 125 (2) (c) of the Land Act 1999 (original text). Also note s. 125 (3) of the Land Act 1999 (original text).

¹⁴ Form No. 45 in the Land (Forms) Regulations 2001, GN No. 71 o 2001.

The amendment of the Land Act, 1999 has more or less streamlined the notice requirements. Now upon default by the borrower in payment of any interest or any other payment or any part thereto or fulfillment of any condition secured by the mortgage or in performance of any covenant, express or implied, in the mortgage, the mortgagee shall serve notice in writing of such default.¹⁵ The notice “shall” inform the recipient of (i) the nature and extent of default, and (ii) that the mortgagee may proceed to exercise his remedies against the mortgaged land; and (iii) that after the expiry of thirty days following the receipt of the notice by the mortgagor, the mortgagee may exercise the right to sell the mortgaged land. As a result, the mortgagee could proceed to sell the mortgaged land only thirty days after the default.¹⁶

This can be a bit worrying to borrowers as there is a very short time before an actual sale can be effected. However, as was observed in the field research, the main interest of the mortgagee is to obtain his money back. He may not take the first opportunity to enforce the mortgage, for instance by selling the mortgaged land, to make a profit out of it because he is not allowed to take more than is due to him. He will decide to fall on the security only when other efforts to recover the money owed are futile.

7.3 Effect of enforcing mortgage

The effect of enforcing mortgages on both the mortgagor and mortgagee depends on the manner in which the mortgage is enforced. The remedies impact differently on the

¹⁵ s. 127 (1) of the Land Act, 1999.

¹⁶ s. 127 (2) (a) and (b) of the Land Act, 1999.

mortgagor and the property in question. Some remedies bring the security to an end, that is to say, they destroy the security. For instance, a sale destroys the security but not necessarily the loan transaction. If a sale results in a shortfall, the mortgagor remains personally liable for the shortfall. On the other hand, the appointment of a receiver or leases of the mortgaged land or entry into possession are not final remedies as they do not destroy the security. They tend to inconvenience the mortgagor and urge a prompt payment while allowing the mortgagee an opportunity to satisfy the debt from his control or appropriation of the proceeds from the property. The situation differs when the mortgagee appoints a receiver or enters into possession and then sells the mortgaged land.

The decision on the part of the mortgagee to choose one remedy and not another may be prompted by a number of factors. Mainly the mortgagee may prefer a remedy which is simple but still guarantee a complete recovery of the money due. Notable is the fact that some remedies are exercisable without the assistance of the court while others do require the involvement of the court. Each remedy and the mode of exercising it will be discussed below.

7.4 Some facts on lending and borrowing and the role of the court in mortgage enforcement

It is a fact that there is a huge demand for lending as individuals and companies try to access credit facilities offered by lenders. The demand for lending is on the increase but

availability of suitable security is a problem.¹⁷ The field research has revealed an uncomfortable reality in regard to lending and borrowing in Tanzania.

The huge demand for borrowing and lack of suitable securities has made borrowers come up with alternatives. It was revealed to me by bankers during my field research that some borrowers are too ambitious in such a way that they go to the length of forging cash books to show that they are sound financially. Some borrowers provide bogus project proposals or project proposals which may not work yet qualify for loan advances. There are reports of borrowers colluding or bribing valuers in valuation of properties to be used as securities. Worse still there are reports that some borrowers borrow because they want to dispose of their properties. To achieve this mischievous intention they borrow and charge the properties they want to dispose of. They then default intentionally well aware that the bank will appropriate the mortgaged property.

The process of mortgage perfection (security perfection) if well conducted, could help to reduce the risks involved in lending. This involves lack of thorough assessment of property offered as security against the financial position of the borrower. Probably competition in the lending market leads the bankers to be undisciplined. Sometimes it seems that the financial position of a potential borrower and his ability to repay the money determines the grant of the credit facility notwithstanding the unavailability of the suitable security. There is also a lack of inspection or proper management of the credit advanced. As a result there are reports of misapplication by borrowers of funds advanced

¹⁷ During the field research I have visited and had discussion with officials of the NBC, Standard Chartered Bank, Tanzania Investment Bank, Stanbic Bank (T) Ltd and Eurafrican Bank. They all shared this fact to me.

either due to lack of knowledge or because borrowers simply use the money to fund other projects. These problems could easily be cured if bankers were disciplined and monitored closely the application of the loans.

When the lenders give credit facilities to bad borrowers, they do that at their own peril. Yet the social, economic and factual reality on the ground at present in Tanzania makes it easy to choose a bad borrower and/or accept unsuitable security. There is no credit information system and as a result the individual lender investigates on its own the financial history of each potential borrower. At present, even where a bank proceeds against a particular borrower the other banks may never know. In 2004 Tanzania Bankers Association launched the Credit Information Bureau (CIB).¹⁸ The bureau is set to create a credit information data base which will be available to all members and therefore minimize some problems regarding lending. Once the Credit Information Bureau becomes operative it will limit some lending risks and therefore boost bankers' confidence.

However, still with no system of national identification to the extent that sometimes bankers have to rely on letters of identification from local leaders, which in some cases are unreliable, there is a lot to be done. Besides, many urban dwellers live in unserved areas with no streets, so it is clear that the CIB will merely reduce the risks involved in lending. There is a feeling that to mitigate these risks and uncertainties, lenders make it difficult for borrowers by imposing punitive contractual terms. But the feeling one gets on the ground is that the lending business hinges on trusts rather than trust plus the

¹⁸ Credit Information Bureau was launched on 19th July 2004 at the Royal Palm Hotel, Dar es salaam.

effective machinery of loans recovery. Yet, the lending and borrowing business seems to flourish despite the difficulties.

The smooth operation of lending and borrowing transactions does not only depend on the presence of a suitable legal framework and institutions which facilitate lending, but also a good disputes settlement mechanism. One would like to see a system where disputes are settled quickly and fairly. It is important that courts' decrees can be executed reasonably quickly. The field research has revealed that lenders complain about the fact that sometimes there is unnecessary delay in dispute settlement. They single out court injunctions as one of the serious problem they face. They complain that when they attempt to enforce mortgages, normally mortgagors rush to court to seek injunctions, requests which according to bankers are readily entertained by the courts. Injunction delay and frustrate the enforcement process.

However, in a paper entitled *The Role of the Courts in facilitating Loan Recovery: Tanzania Experience*,¹⁹ Justice Kalegeya of the High Court of Tanzania (Commercial Division/Court) summarized the court's experiences on the problems of loans recovery in the country. At the outset, he observed that the problems of loans recovery through the Commercial Court do not revolve around the court's laxity but arise from the following:

- (i) first he mentioned flaws in the granting of loans and in the prosecution of cases, then
- (ii) capitalization of the borrowers, their spouses or interested parties on flaws created,

¹⁹ Paper presented by Justice L.B. Kalegeya of Commercial Division of the High Court of Tanzania at the Tanzania Bankers Association Conference, 8th March 2005, Golden Tulip, Dar es salaam.

and lastly (iii) the provisions of the law which seemingly lean in borrowers' favour but unfairly against lenders.

The first problem is acknowledged by lenders. We have already observed that there is a problem of mortgage imperfection which ultimately results in many legal disputes. There is a lack of proper scrutiny of securities or collaterals offered, probably due to imperfect physical inspection of the properties offered as securities, or due to reliance on unreliable property valuations. Unsurprisingly many time securities given are insufficient to cover the credit facilities and hence there is a shortfall. It must be noted that the shortfall is sometimes attributed to a believed trend for the value of properties in Tanzania to depreciate, but that belief is not backed by any tangible evidence.

The second problem is related to the first one in that borrowers sometimes take advantage of improper or invalid mortgages to defeat the enforcement process. A typical example involves mortgages of matrimonial homes. Sometimes failure by the lenders to obtain a spouses' consent is used as an excuse to prevent the realisation of the home. Despite the problems mentioned above, courts have to play a decisive role.

Between 2000 and 2004 mortgage disputes were referred to the Commercial Division of the High Court. However, the Land Act, 1999 and the Village Land Act, 1999 have introduced a separate tier of land disputes settlement.²⁰ Section 167 (1) of the Land Act, 1999 states that the following courts are vested with exclusive jurisdiction to hear and determine all manner of disputes, actions and proceedings concerning land, that is to say-

²⁰ See s. 167 of the Land Act, 1999 and s. 62 of the Village Land Act, 1999.

- (a) The Court of Appeal of Tanzania;
- (b) The Land Division of the High Court established in accordance with the law for the time being in force for the establishing courts divisions;
- (c) The District Land and Housing Tribunal;
- (d) Ward Tribunal;
- (e) Village Land Council,

Then the Land Disputes Courts Act, 2002²¹ was enacted to provide for the powers and jurisdictions of the above mentioned courts.

The Village Land Council is responsible for mediating land conflicts with the view to reaching mutual settlement of disputes. Importantly, it has jurisdiction to settle disputes concerning mortgages of land contracted under customary law with appeals to the Ward Tribunal.²² The District Land and Housing Tribunal, apart from entertaining appeals from the Ward Tribunals, exercises original jurisdiction in all proceedings under the Land Act and the Village Land Act 1999, Customary Leasehold (Enfranchisement) Act, 1968, Rent Restriction Act, 1984 and the Regulation of Land Tenure (Established Village) Act, 1992.²³ It also exercises original jurisdiction in all such other proceedings relating to land under any written law in respect of which jurisdiction is granted by any such law.²⁴ The pecuniary jurisdiction of the District and Housing Tribunal is limited to fifty million shillings for immovable property and forty million shillings for any other proceedings.²⁵

²¹ Act No. 2 of 2002 [Courts (Land Disputes Settlements) Act, 2002].

²² See ss. 7 and 8 of the Land Disputes Courts Act, 2002. Also see s. 115 of the Land Act, 1999.

²³ s. 33 (1) (a) of the Land Disputes Courts Act, 2002.

²⁴ s. 33 (1) (b).

²⁵ s. 33 (2) (a) and (b). See also proviso to section 33 in which pecuniary jurisdiction is unlimited to proceedings under the Customary Leaseholds (Enfranchisement) Act, 1968 and the Regulation of Land Tenure (Established Village) Act, 1992.

Probably more important is the introduction of the High Court (Land Division). The Land Division of the High Court assumes the mantle of adjudication in land matters. The court exercises original jurisdiction among others, in proceedings for the recovery of possession of immovable property in which the value of the property exceeds fifty million shillings and in other proceedings where the subject matter capable of being estimated at a money value exceeds forty million shillings.²⁶ The High Court (Land Division) also exercises original jurisdiction in all proceedings under the Tanzania Investment Act, 1997, the Land Act, 1999 and the Land Acquisition Act, 1967 in respect of proceedings involving the government.²⁷ It must be noted that the Tanzania Investment Act, 1997 established the Tanzania Investment Centre, an institution which is tasked with the responsibility of granting land to non citizens. That land may be subject to enforcement proceedings. Similarly, the Land Acquisition Act, 1967 may impact on mortgaged land as the Act empowers the President to appropriate the land for public interest.

The High Court (Land Division) also exercises original jurisdiction in all proceedings involving Public Corporations specified in the Rent Restriction (Exemption) (Specified Parastatals) Order, 1992.²⁸ It also exercises original jurisdiction in all such other proceedings relating to land under any written law in respect of which jurisdiction is not limited to any particular court or tribunal.²⁹ This is a wide power making the inception of the High Court (Land Division) an important development in regard to adjudication of

²⁶ s. 37 (a) and (b).

²⁷ s. 37 (d).

²⁸ s. 37 (d).

²⁹ s. 37 (e).

land matters. It is the court, together with the District and Housing Tribunal where most mortgages disputes would go. Ultimately disputes may be taken to the Court of Appeal of Tanzania which is the highest court (court of last resort) in the land.

As observed above, before the inception of the High Court (Land Division), most mortgage disputes were referred to the High Court (Commercial Division). The Commercial Court is entrusted with the task of settling commercial disputes with appeals going to the Court of Appeal. In general a mortgage is a commercial matter, but a mortgage of land is also a land matter. As far as mortgages of land are concerned, there is an overlapping. There may be a land case and a case of mortgages of land which is a land and commercial matter. These two sets of cases are now to be instituted in the Land Division of the High Court.³⁰

However, it must be noted that a case of mortgage of land may primarily involve commercial matters with merely elements of land. Such cases should be the subject of the Commercial Court. As a result there is a feeling that the law should have given an alternative as to where one could institute an action involving the mortgage of land. On the other hand commercial matters including cases of mortgages of other property go to the Commercial Court. We will now discuss specific remedies available to the mortgagee.

³⁰ Ruling by Kileo J of the preliminary objection in *Michael Mwailupe v CRDB Limited and Others*, High Court of Tanzania (Land Division) Land Case No. 7 of 2003 (unreported).

7.5 Appointment of a receiver

We have seen above that the mortgagee has a range of remedies available to him. One of the remedies is the appointment of a receiver. The power to appoint a receiver is implied in any mortgage.³¹ Its exercise is appropriate where the mortgaged property is capable of generating income. Basically, the receiver appointed will receive the income of the mortgaged land and apply it to satisfy the debt. The power of a receiver is discussed in part 7.5.1 below.

As observed in the field research the appointment of a receiver is not a popular remedy in Tanzania because of the administration costs involved and the difficulties of realizing security in this manner.³² Before the 2004 amendment of the Land Act, 1999, the procedures for the appointment of a receiver were difficult. The mortgagee was supposed to issue successive notices before he could appoint a receiver.³³ The conditions were that if the default was the performance of the conditions in the mortgage the mortgagee had to wait for not less than three months before he could appoint a receiver or wait for not less than four months if default was for payment of money. Before the mortgagee could

³¹ s. 128 (1) of the Land Act, 1999.

³² The high cost of receivership is partly contributed by the fact that the receiver's remuneration is charged separately from the costs, charges and expenses of receivership. As a result the five per centum commission allowed under section 128 (7) is for the receiver's remuneration and not for his remuneration and costs and expenses incurred by him as a receiver. It was possible to frame the provision so that the commission charged was to be for the receiver's remuneration and costs, charges and expenses. Compare s. 128 (7) of the Land Act, 1999 which states "the receiver shall be entitled to retain out of any money received by him all costs, charges and expenses incurred by him as receiver and, for his remuneration, a commission at the rate not exceeding five per centum of the gross amount of all monies received as specified in the appointment..." and s. 109 (6) of the Law of Property Act, 1925 which states "the receiver shall be entitled to retain out of the money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver(s), a commission at such rate...". See *Marshall v Cottingham* [1982] 1 Ch 82 at 88-89 for the discussion of the effect of s. 109 (6) of the Law of Property Act, 1925.

³³ See part 7.2.

actually appoint a receiver, he had to give another notice to the borrower and wait until thirty days had elapsed before he could now proceed to appoint a receiver.³⁴

Furthermore, the manner of the exercise of the power to appoint a receiver varied with different forms of mortgages.³⁵ For some mortgages such as small mortgages, the mortgagee had to obtain an order of the court before he could appoint a receiver.³⁶ But now the new provisions of the Land Act, 1999 on the appointment of a receiver have tried to make it easy to appoint a receiver. The requirement of notice is now restricted to a single general notice issued under section 127 (1) of the Land Act, 1999.³⁷ It is a notice which informs the mortgagor of the default, and after the lapse of the time given, the mortgagee can then proceed to appoint a receiver.³⁸

Besides, there is no longer the requirement of the order of the court for certain forms of mortgages before the mortgagee could appoint a receiver. The only important thing is that the appointment of a receiver must be in writing and signed by the mortgagee.³⁹ And the receiver appointed may be removed at any time and a new one appointed in his place.⁴⁰

³⁴ s. 127 (2) of the Land Act, 1999 (original text). Form no. 46 of the Land (Forms) Regulation 2001, GN No. 71 o 2001.

³⁵ See s. 125 (3) (b) of the Land Act, 1999 (original text).

³⁶ s. 125 (3) (c) (i) of the Land Act 1999 (original text).

³⁷ See part 7.2.

³⁸ S. 128 (2) of the Land Act, 1999.

³⁹ s. 128 (3).

⁴⁰ s. 128 (4).

7.5.1 Powers and duties of a receiver

The receiver is deemed to be an agent of the mortgagor for the purpose under which he is appointed. This set up unless otherwise provided in the mortgage deed, makes the mortgagor solely responsible for the acts and defaults of the receiver.⁴¹ The main duty of the receiver under section 128 is to collect the income of the mortgaged property and use it to pay off the debt. He can also proceed to sell the mortgaged land.⁴²

One may wonder if the power of a receiver under section 128 (1) of the Land Act, 1999 is limitless. For instance, can he be asked to simply strip the property or cut the timber and sell if the mortgaged property is a forest? In practice, as was observed in the field research receivers strip the property to satisfy the debt and then exit. There is a need for judicial interpretation of the extent of the exercise of the power of a receiver under section 128 (1) of the Land Act, 1999. The power to receive the income of the mortgaged land under section 128 (1) is clear. It means diverting the income of the mortgaged land so that the money does not go to the mortgagor but to the mortgagee through the receiver (a third party).⁴³ Stripping the property is not what is envisaged under section 128 (1). Unless the power to appoint a receiver is extended in the mortgage (express power), for instance to provide for the appointment of a receiver of “the mortgaged property or the property charged”, anything more than receiving the income and sale of the mortgaged

⁴¹ s. 128 (5).

⁴² At common law, the Law of Property Act, 1925 does not give the receiver the power of sale. As a result the power to sell the mortgaged property is available only if it is provided in the mortgage. See F & L p. 313. Also see *Marshall v Cottingham* [1982] 1 Ch 82 at 89.

⁴³ See *White v Metcalf* [1903] 2 Ch. 567 at 570.

land is not within the power as provided under section 128 (1) and (5) of the Land Act, 1999.⁴⁴

In particular, the receiver has power to demand and recover in the name of the mortgagor all the income of which he is appointed a receiver. He can demand and recover the income by action or otherwise and then give effectual receipts for the income recovered.⁴⁵ The receiver must apply the income received by him in the order as provided under section 128 (8) of the Land Act, 1999. It is provided that the receiver must first pay all rents, rates, charges, taxes and other outgoings required to be paid in respect of the mortgaged land.⁴⁶

We have seen that the appointment of a receiver does not necessarily have the effect of destroying the mortgage. As a result, payments of rents, rates and other charges will ensure that the mortgage remains alive. Secondly, he must apply the income to keep down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage of which he is a receiver.⁴⁷ Thirdly the receiver has to apply the income to pay his remuneration and expenses.⁴⁸ Fourthly, he must apply the income in payment of all reasonable expenses incurred in the doing of anything which a receiver is required or entitled to do in respect of the mortgaged land such as payment of any premiums on any insurance policy payable under the mortgage instrument or, payment of

⁴⁴ If the mortgaged property is a forest, it does not mean cutting the timber, but the receiver can proceed to sell the mortgaged land. Managing the property is not what is envisaged under section 128 (1) of the Land Act, 1999.

⁴⁵ s. 128 (6).

⁴⁶ s. 128 (8) (a).

⁴⁷ s. 128 (8) (b).

⁴⁸ s. 128 (8) (c). See also s.128 (7).

the costs of repairs to any buildings comprised in the mortgaged land as directed in writing in the mortgage.⁴⁹

The receiver must apply the income in payment of any money paid or advanced to meet the above mentioned expenses together with any interest on any amount so paid or advanced at the rate at which interest is payable on the principal sum secured by the mortgage.⁵⁰ Also he must apply the income in payment of the interest accruing due in respect of any principal sum secured by the mortgage, and lastly apply the income towards the discharge of the principal sum secured by the mortgage. The residue if any has to be credited to the mortgagor or any other person entitled to the mortgaged land.

The receiver must stick to the chronological order indicated above. One must note that the application of the income to satisfy the mortgagee's debt ranks down in the ladder. As a result if the cost of administration of receivership is high because of the expenses caused by the need to pay outstanding rates and taxes or receiver's remuneration, it would not be easy to satisfy the debt in this manner. Therefore the appointment of a receiver can work only if the property in question is capable of generating a substantial income within a short time. In addition, only a small sum should remain payable for the appointment of a receiver to be effective. Otherwise, it is an expensive way of enforcing a mortgage which might not facilitate a full recovery of the money owed. As observed in the field research, mortgagees do not prefer this manner of enforcing mortgages.

⁴⁹ s. 128 (8) (d).

⁵⁰ s. 128 (8) (e).

7.6 Lease of mortgaged land

Leasing of the mortgaged land is another remedy available to the mortgagee. It is a power which is available but may be excluded by express provisions in the mortgage deed. The power to lease the mortgaged land was provided for under the Land Act, 1999 and retained by the 2004 amendment of the Act.

The amendment to the Land Act, 1999 changed the position in regard to the power to lease the mortgaged land. The Land Act, 1999 before its amendment in 2004 provided under section 125 (3) (b) for the power of the mortgagee to lease the mortgaged land or, if the mortgage was of a lease, to sublease the land to enforce the mortgage. Again the mortgagee had to comply with the requirement in regard to the issue of notices.⁵¹ The provision was such that it could take up to five months before the mortgagee could resort to any remedy available to him. Significantly the wording of section 128 (1) stipulated that a lender who had appointed a receiver under section 127, should, unless the mortgage instrument expressly provided to the contrary, have power, subject to the provisions of this Act and any other laws applicable to leases of land, to grant a lease in respect of the mortgaged land.

As a result, if leasing of the mortgaged land was preceded by an appointment of a receiver, then the time required before such a lease could be granted would have to include not less than two more months on top of the time needed for the appointment of a

⁵¹ See part 7.2.

receiver.⁵² This was because one would have to appoint a receiver after giving a notice under section 127 (2) and not proceeding with the appointment until thirty days had expired from the date of the service of the notice. The leasing itself of the mortgaged land required a notice under section 128 (2) by which a lender had to wait until thirty days had elapsed from the service of the notice before he could grant a lease. The time in which lenders had to wait from the point of default to the time before they could actually enforce the mortgage was a burden.

As observed above, the leasing of mortgaged land was subject to the Land Act, 1999 and any other laws applicable to the leases. There were conditions of the lease under subsections (3), (4), (5) and (6) of section 128.

There was no general requirement for the order of the court before the mortgagee could lease the mortgaged land. However, there were exceptions to certain forms of mortgage. There was a need for an order of the court before the mortgagee could lease or sub lease the mortgaged land where the mortgage was a small mortgage⁵³ or the mortgage was of land held under a customary right of occupancy.⁵⁴

The amendments to the Land Act, 1999 have clarified and simplified the process of leasing the mortgaged land to enforce the mortgage. The mortgagee may still grant a

⁵² See s. 128 (3) (e) of the Land Act, 1999 (original text).

⁵³ s. 125 (3) (c) (ii) of the Land Act, 1999 (original text). Note there is no longer provision for small mortgages under the Land Act, 1999.

⁵⁴ s. 125 (3) (d) (ii) (aa) of the Land Act, 1999 (original text).

lease of the mortgaged land or, if the mortgage is of a lease, sub-lease the land.⁵⁵ The lease granted will be subject to the Land Act, 1999 and any law applicable to the leases of land. The law does not require the appointment of a receiver as was the position before the amendment before a lease is granted. As a result there is no reference to a receiver under section 129 which succeeded section 128 of the Land Act, 1999.

In general, the leasing of mortgaged land occurs out of court after the mortgagee has given a general notice. This means a mortgagee can proceed to grant a lease thirty days after giving a general notice under section 127 (2) of the Land Act, 1999.⁵⁶

The amendment of the Land Act, 1999 also standardized the lease requirements. There is no exception as to different forms of mortgages such as small mortgages or for mortgages of land held under customary law. But there is still inconsistency in the provisions on the power to lease the mortgaged land. Unlike other remedies such as appointment of a receiver or entry into possession of the mortgaged land, where the law provides for the manner of application of profits which accrue from the land,⁵⁷ the Land Act, 1999 does not direct how the money obtained from the leasing of the mortgaged land should be applied. It is not clear whether the mortgagee has to use the rent to first satisfy his debt or not. That was an oversight.

⁵⁵ s. 129 (1) of the Land Act, 1999.

⁵⁶ There is no need for a specific notice under section 129.

⁵⁷ See part 7.5.1 and part 7.7.2 for the discussion on the application of profits accrued during receivership and possession of the mortgaged land respectively. See also Chapter Eight, part 8.8 for the application of the proceeds of sale.

But the provisions of section 130 of the Land Act, 1999 on the application of the profits accruing to the mortgagee in possession are relevant to the application of the profits of the lease. This is because leasing and possession both require the direct management of the mortgagee. In that way, they are both capable of being regulated by the same provisions. But the appointment of a receiver requires the service of a third party that is the receiver. The receiver is appointed by the mortgagee but in law is an agent of the mortgagor. It follows that the mortgagee leasing the mortgaged land should be able to appropriate all the profits of the lease. He then has to apply the money first in payment of all the rents, taxes and charges in respect of the mortgage property. Secondly he must make payments to secured creditors who have priority to his mortgage; thirdly, he has to pay reasonable expenses incurred by him in managing the mortgaged land; and lastly he has to apply the money to satisfy his debt.

In the following part we will examine exceptions affecting particular classes of properties for which a mortgagee needs to seek an order of the court before he can grant a lease.

7.6.1 Classes of properties for which power to grant a lease is subject to prior conditions

There is a class of properties in which the power of the mortgagee to lease or sub lease is qualified. Subsection (5) of section 129 of the Land Act, 1999 states that a mortgagee shall not exercise the power under subsection (1) in relation to any such land as is referred to in paragraphs (a), (b) or (c) of subsection (5) of section 130 without first

having obtained an order for possession thereof from the court or having taken possession in the manner prescribed in paragraph (b) of subsection (2) of section 130.

In general section 130 is on the power of the mortgagee to take possession of the mortgaged land. The power of the mortgagee to enter into possession of the mortgaged land is discussed in part 7.7 below. For our purpose, the first condition involves a category of properties the taking of physical possession of which would require an order of the court. The properties are listed under subsection (5) of section 130. It mentions:–

- (a) a dwelling house in which any person is in residence; or
- (b) any land in actual use for agricultural purposes;
- (c) any land in actual use for pastoral purposes; or
- (d) [...]

The reasons for the requirement of an order of the court before the mortgagee could take physical possession of the three categories of land mentioned above will be discussed in part 7.7 below. However, a quick diagnosis seems to point to properties on which one's livelihood or one's very existence depended. The law would therefore want supervision by the court when those kinds of property become liable in mortgage disputes.

The second condition, provided under section 130 (2) (b) of the Land Act, 1999 involves the situation where the mortgagee exercises the power to enter into possession by asserting management or control over the land by serving a notice in the prescribed form requiring any lessee or the mortgagor or any other occupier of the land to pay to him any

rent or profits which would otherwise be payable to the mortgagor. In this situation, a mortgagee needs to seek and obtain an order of the court before he leases the property.

There is good sense in this latter requirement. If the property is already leased or there is an occupier of the land and rent or profits accrue from that land, indirect control and not the grant of a new lease would suffice. For a leased property, another lease by the mortgagee would achieve more or less the same result.

7.7 Action for possession (entry into possession)

The mortgagee may take possession of the mortgaged land to enforce the mortgage. The act of entering into possession may be aimed at inconveniencing the mortgagor to effect a punctual payment of the money due or observance the conditions of the mortgage. The mortgagee may enter into possession to ensure punctual payment by collecting income from the property himself. He may also enter into possession and then appoint a receiver or enter into possession as a preliminary step to an exercise of the power of sale.

The Land Act, 1999 under section 130 (1) as amended simply states that a mortgagee may, at any time after the service of a notice under section 127, enter into possession of the whole or part of the mortgaged land.⁵⁸ The notice under section 127 is a thirty days notice which informs the mortgagor of the default and states that the mortgagee may decide to exercise any of his remedies under the mortgage. The requirement under section

⁵⁸ See also s. 126 (c) of the Land Act, 1999.

127 and in particular section 130 is an improvement compared to the replaced guiding provisions provided under section 125 and 129 respectively.

Before the amendment of the Land Act, 1999 in 2004, the then applicable provision, section 129 (1) stated that a lender might, at any time after the end of the period specified in the paragraphs (b) and (c) of subsection (2) of section 125, serve a borrower with notice in the prescribed form of intention to enter into possession of the whole or part of the mortgaged land at a date not earlier than one month after the date of the service of the notice. The implication of the requirement that one had to comply with section 125 meant it could take at least four months for the mortgagee to enter into possession. The amended provision avoids multiple notices and hence shortens the time under which one can enter into possession.

The power to enter into possession discussed in this part is a statutory right to enforce the mortgage on default. This should be differentiated from entering into possession as a right. We have seen in the previous chapter that at common law a legal mortgage gives the mortgagee a legal estate in the property. The fact of the mortgage, subject to agreement to the contrary, entitles him to take possession of the mortgaged property as soon as the mortgage is made with or without default on the mortgagor's part. This is a common law right of possession as a right and not as a remedy.⁵⁹

⁵⁹ M & W p. 1200.

The exercise of this right was described in *Four-Maids Ltd v Dudley Marshalls (prop) Ltd*.⁶⁰ It was stated that:

“the right of possession in the absence of some contract has nothing to do with default on the part of the mortgagor. The mortgagee may go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right. He has the right because he has a legal term of years in the property or its statutory equivalent. If there is an attornment, he must give notice. If there is a provision that, so long as certain payments are made, he will not go into possession, then he has contracted himself out of his rights. Apart from that, possession is a matter of course.”

The right to take possession as a right and not a means of enforcing security enables a mortgagee to enter into possession to preserve the value of his security even if there is no default at all.⁶¹ If the mortgagee is satisfied that the mortgagor, either by absence from the property giving rise to the need to protect it from vandalism, or by his poor standards of management and maintenance (without amounting to breach of covenants), is not doing all he the mortgagee would wish to see done, his common law right of possession is a valuable instrument of self-help.⁶²

⁶⁰ [1957] Ch. 317.

⁶¹ See *Western Bank Ltd v Schindler* [1977] 1 Ch. 1 at 11.

⁶² At p. 11 per Scarman L.J.

Whether the mortgagee could enter into possession as a right in Tanzania is not clear. In any case, if he can, then that power would not draw its basis from section 130 of the Land Act, 1999.

Possession may be taken directly in the sense that a mortgagee takes physical possession of the land or part of it peaceably.⁶³ In this way, the mortgagee will be regarded as being possession on the date when he actually enters into possession.⁶⁴ Possession may also be exercised indirectly where the mortgagee asserts management or control over land by serving a notice in the prescribed form requiring any lessee or the mortgagor or any other occupier of the land pay to him rent or profits which would otherwise be payable to the mortgagor.⁶⁵ If possession is effected in this manner, the mortgagee will be regarded as in possession from the date on which he first receives any rent or profits from the land.⁶⁶ In addition, possession may be effected pursuant to an order of the court.⁶⁷

Possession whether physical or otherwise is normally obtained out of court. However, there is a category of land or properties in which a mortgagee must seek and obtain order of the court before he can enter into physical possession. These properties are listed under subsection (5) of section 130 of the Land Act, 1999.⁶⁸

⁶³ s. 130 (2) (a) of the Land Act, 1999.

⁶⁴ s. 130 (3) (a) of the Land Act, 1999.

⁶⁵ s. 130 (2) (b) of the Land Act, 1999.

⁶⁶ s. 130 (3) (b) of the Land Act, 1999.

⁶⁷ s. 130 (2) (c) of the Land Act, 1999.

⁶⁸ See also part 7.6.1 above.

The Land Act, 1999 defines a dwelling house as any house or part of a house or room used as a separate dwelling in any building and including any garden or other premises within the curtilage of and used as a part of the dwelling house.⁶⁹ But what amounts to land in actual use for agricultural purposes is not clear. One may wonder whether reference to land in actual use for agricultural purposes refers to only subsistence agriculture or both large scale and small scale agriculture. The same issue applies to land in actual use for pastoral purposes. But the presumption is that subsection (5) of section 130 refers to a kind of mortgaged property being a dwelling house or agricultural land the occupier of which depends almost entirely on that land for their livelihood or existence. This might be the reason for the need of the court's supervision.

Is the category under subsection (5) of section 130 closed? How about land under small scale mining operations or trade? Is it not true that land under small scale mining operations or land used for fishing are of the same characters as land listed in paragraphs (b) and (c) of subsection (5) of section 130? In my opinion, they are of the same character and nature. If a court's supervision is necessary for the taking into possession of land in actual use for agricultural or pastoral purposes, then the law should have left the door ajar for similar activities to be fitted in. The only possibility is the use of paragraph (d) of subsection (5) of section 130. It mentions "any land where the taking of physical possession peaceably is not possible".

⁶⁹ See s. 2 (definition section) of the Land Act, 1999.

7.7.1 Mortgagee withdrawal from possession

The mortgagee must withdraw from possession where he proceeds to exercise other remedies or where the mortgagor rectifies the defaults which led to possession or where the mortgagor becomes entitled to discharge of the mortgage.

Section 131 of the Land Act, 1999 provides the circumstances in which a mortgagee has to withdraw from possession of the mortgaged land. It provides that the mortgagee shall withdraw from possession of the mortgaged land where a court makes an order directing him to withdraw.⁷⁰ Any person entitled to the mortgaged land and who feels he is wrongly deprived of the possession of the mortgaged land or who wishes to challenge the manner in which possession was effected can ask the court to order the mortgagee to withdraw from possession. In this case, where an order of the court directing the mortgagee to withdraw from possession of the mortgaged land is issued, he shall be taken to have withdrawn from possession when the order of the court is made.⁷¹

However, when the mortgagee in possession exercises other remedies, for instance when he appoints a receiver under section 128 or exercises a power of sale under section 132, he shall withdraw from the mortgaged land.⁷² When the mortgagee sells the mortgaged land in exercise of his power of sale, he shall be taken to have withdrawn when the purchaser of the mortgaged land enters into occupation of the land.⁷³ The law does not

⁷⁰ s. 131 (1) (a) of the Land Act, 1999.

⁷¹ s. 131 (2) (a) of the Land Act, 1999.

⁷² s. 131 (1) (b) and (d) of the Land Act, 1999 respectively.

⁷³ s. 131 (2) (d) of the Land Act, 1999.

clarify the position where a mortgagee sells just part of the mortgaged land and retains possession of the other. Decided cases will have to settle this dilemma, but from the circumstances of the situation, it may be argued that the mortgagee will be regarded as having withdrawn from possession only in regard to the land sold.

Another situation which requires the mortgagee to withdraw from possession is that where the mortgagor rectifies the default which was the cause of possession.⁷⁴ The withdrawal under this head begins when the mortgagee ceases to occupy the mortgaged land,⁷⁵ or where he is not in occupation and has served a notice of withdrawal on all persons previously served with a notice under paragraph (b) of section 130 (2).⁷⁶

And the last circumstance under which the mortgagee has to withdraw from possession is when the mortgagor has become entitled to a discharge of the mortgage under section 121.⁷⁷ The right of the mortgagor to be entitled to discharge of the mortgage is discussed in Chapter Six, part 6.7 above.

The mortgagee who has withdrawn from possession but seeks to reenter into possession must start the process from the beginning and comply with the requirements under section 130 of the Land Act, 1999.⁷⁸

⁷⁴ s. 131 (1) (c) of the Land Act, 1999.

⁷⁵ s. 131 (2) (c) (i) of the Land Act, 1999.

⁷⁶ s. 131 (2) (c) (ii) of the Land Act, 1999.

⁷⁷ s. 131 (1) (e) of the Land Act, 1999. See also s. 131 (2) (e).

⁷⁸ s. 131 (3) of the Land Act, 1999.

7.7.2 The power and duty of the mortgagee in possession

The underlying purpose of possession of the mortgaged land is to enforce the security either by simply inconveniencing the mortgagor to secure punctual payments or for the purpose of appropriating the profits from the property which would be applied to discharge of the mortgage. Possession of the land may lead towards an appointment of a receiver, lease, or sale of the mortgaged land.

It is provided under subsection (6) of section 131 that a mortgagee in possession of any mortgaged land by occupation shall be entitled to manage the land and take all its profits, but shall be liable to the mortgagor for any act by which the value of the land, or any buildings on, or other permanent improvements to the land are impaired or the borrower otherwise suffers loss. It is a power to appropriate the profits from the land which comes with a duty on the mortgagee to make sure that the property is not mishandled.⁷⁹

Apart from that, the law directs how the mortgagee in possession should apply the profits which accrue to him while in possession. It is provided under subsection (7) of section 131 that a mortgagee in possession shall apply all the moneys received by him to the same payments and in the same order as would apply to a receiver and which are set out in subsection (8) of section 128.⁸⁰ The law empowers him to appropriate the rents and apply them towards the payment of the interest and discharge of the principal sum

⁷⁹ For the similar duty at common law, see *Palk v Mortgage Services Funding Plc* [1993] Ch 330 at 338.

⁸⁰ See part 7.5.1.

secured by the mortgage.⁸¹ However, the mortgagee is not entitled remunerate himself for taking possession of the mortgaged land.⁸² But he can still use the money in payment of reasonable expenses incurred, for example in payment of the premiums on the insurance policy payable under the mortgage and the costs of undertaking necessary and proper repairs to any building comprised in the mortgaged land as directed in the mortgage.

The Land Act, 1999 does not allow the mortgagee to take more than is due to him under the mortgage, but he has to pay the surplus if any to the mortgagor or any person entitled to the mortgaged land.⁸³ The issue is, does the duty mean the mortgagee must account strictly for the use of profits (proceeds) actually received and profits which, but for his willful neglect or default he might have received while he was in possession?⁸⁴ The common law requires this duty.

The wording of section 128 (8) does not impose such a high duty. At common law, the mortgagee is bound to exercise his power of possession in good faith. He is supposed to act fairly towards the mortgagor. It is a fact that his interest in the property takes priority over that of the mortgagor, but he is not entitled to conduct himself in such a manner which unfairly prejudices the mortgagor.⁸⁵ It was stated in *Palk v Mortgage Services Funding Plc*⁸⁶ that if he takes possession he cannot just sit and wait. He must take reasonable care to maximise his return from the property as he would be accountable for

⁸¹ See *Wrigley v Gill* [1905] 1 Ch. 241.

⁸² See s. 130 (7) and 128 (8) (c) of the Land Act, 1999.

⁸³ See the later part of s. 128 (8).

⁸⁴ *White v City of London Breweries Co.* (1889) 42 Ch. D 237.

⁸⁵ *Palk v Mortgage Services Funding Plc* [1993] Ch. 330 at 337.

⁸⁶ [1993] Ch. 330 per Sir Donald Nicholls V.C.

both the actual receipts from the property and for what he would have received but for his default.⁸⁷ This principle is not based on statutes but on common law and equity.⁸⁸ It is a principle which should find sympathy and a place for application in Tanzania.

7.8 Power of sale

The mortgagee's power of sale is discussed in detail in Chapter seven below.

7.9 Action to recover the loan

A mortgage is a loan contract. It is a contract where the mortgagee advances money based on the mortgagor's promise to repay in the future. The promise to repay may or may not be contained in the mortgage deed. But the mere fact of accepting a loan carries with it an implied promise to pay back.

The nature of the personal obligation to repay the loan was well summarized in *Sutton v Sutton*.⁸⁹ In that case Jessel M.R. gave a position in regard to the right to proceed personally against the mortgagor to recover the mortgage debt. He stated that the fact of accepting a loan by implication carries a mortgagor's promise to pay back the debt. He stated that "every mortgage contains within itself, so to speak, a personal liability to

⁸⁷ At p 338.

⁸⁸ See *Quennell v Maltby* [1979] 1 WLR 318 at 322-322.

⁸⁹ (1882) 22 Ch 511.

repay the amount advanced”.⁹⁰ According to Jessel, M.R. the personal liability is implied in the mortgage deed and not necessarily based on the statutory stipulations.

However, statute provides for the mortgagor’s personal obligation to repay the money. Section 124 (1) (a) of the Land Act, 1999 provides to the effect that there is implied in any mortgage a covenant by the mortgagor with the mortgagee binding the mortgagor to pay the principal money and interest on the day appointed in the mortgage agreement. This position does not apply to a third party mortgage because under such a mortgage it is normally the borrower and not the mortgagor who is responsible to pay the money.

Normally, the mortgage deed contains a covenant for payments (covenant to pay). The covenant may set out in clear terms when and how the debt will be paid. If the mortgagor fails to repay back the loan when it is due, the mortgagee can enforce the mortgage.⁹¹ However, the mortgagee may also decide to enforce repayment by instituting an ordinary suit against the mortgagor to effect payment. Unless the mortgagor charges his property to secure the debt of another (borrower) as in the case with the third party mortgage, the mortgagor remains personally liable for the payment of outstanding debt.⁹² The right of action is a personal right exercisable only against the person who covenanted to repay the money. As a result, the transfer of the equity of redemption does not necessarily relieve the mortgagor from personal liability.

⁹⁰ At p. 516.

⁹¹ If there is no covenant for repayment, the mortgagee can sue for the debt, see *Jackson v North Eastern Railway Co* (1877) 7 ChD 573.

⁹² There is no personal contract for the repayment against for instance the person who agrees to charge his property for the debt of another.

The Land Act, 1999 has not changed much the position in regard to the personal liability of the mortgagor to repay the money. The position is still similar to the common law position that, if the mortgage deed contains a covenant for payment on certain date, the right of action arises upon non payment on such a date.⁹³ That means the lender could not maintain an action for the payment of the money before the arrival of such date.

The right to proceed personally against the mortgagor could be elected instead of falling on the mortgaged security. But the mortgagee who elected to pursue his remedies against the mortgaged property such as selling of the mortgaged land in exercise of the power of sale given to him by the mortgage deed or under the order of the court can later sue the mortgagor for the balance.⁹⁴ The only time where the mortgagee is barred from suing for the balance is where the shortfall was caused by his fault such as mishandling of the mortgaged property.⁹⁵

As originally enacted, the Land Act, 1999 contained a provision for the suit to recover the mortgaged money. The provision was contained in section 125 (3) (a). It stated in effect that the lender could sue the borrower for the monies dues under the mortgage. As is the case with other remedies, a suit to recover the money was to follow elaborate procedures. The mortgagee among others had to serve successive notices to the mortgagor before

⁹³ See *Bolton v Buckenham* [1891] 1 QB 278 at 281; *Re Tewkesbury Gas Co* [1911] 2 Ch 297, [1912] 1 Ch 1. See also *In re Brown's Estate* [1893] 2 Ch 300 for the right of action if payment is on demand.

⁹⁴ *Gordon Grant and Co v Boos* [1926] AC 781.

⁹⁵ *Worthington v Abbott* [1910] 1 Ch 588.

instituting such a suit.⁹⁶ Indeed section 126 (2) stated that “no action shall be commenced until the time for complying with a notice served under section 125 has expired”.

And then the mortgagee could not sue the mortgagor (borrower) in each and every case, but only limited cases. The circumstances which could give the right to recover the money by suit provided under subsection (1) of section 126. It provided that:

(1) The lender may sue for the money secured by the mortgage only in the following cases –

(a) where the borrower is personally bound to repay the money,

(b) where by any cause other than the wrongful act of the borrower a reasonable opportunity to provide further security sufficient and the borrower has failed to provide that additional security;⁹⁷

(c) where the lender is deprived of the whole or part of his security through or in consequence of the wrongful act or default of the borrower.

The limiting of the right of action to only three circumstances was uncalled for. As a general principle, a mortgagee may elect to sue for the money despite the security. Other circumstances apart from the cases provided above may lead the mortgagee to sue for the money. As originally enacted the Land Act, 1999 used the expression “borrower” for the

⁹⁶ See Chapter Eight, part 8.3 below.

⁹⁷ Some words are missing between “sufficient” and “and”.

“mortgagor”. Now where the borrower (mortgagor) was not the person who actually borrowed the money, there was a dilemma in expression. So paragraph (a) of subsection (1) reflected that difficulty. It is suitable in the sense that the right to sue for the money is against the person who promised to pay. So the paragraph envisaged a third party mortgage although the Land Act did not support the creation of a third party mortgage⁹⁸ or a situation where the borrower is for instance a trustee. Paragraph (b) of subsection (1) looked at a situation where the mortgagee had insufficient security and the request for additional security was not met. And paragraph (c) of subsection (1) was probably limited to cases where the mortgagee was left unsecured because of the destruction of the subject matter of the security.

Furthermore, the power to sue was regarded as a last resort for the mortgagee who first pursued his remedies against the mortgaged land. It was not seen as an option that the mortgagee could proceed personally against the mortgagor either before or after enforcing the mortgage. As a result, the court was given discretion to postpone personal proceedings against the mortgagor until the mortgagee had exhausted all his remedies against the mortgaged land.⁹⁹

The amended provisions of the Land Act, 1999 does not contain similar provisions. The relevant part of the Land Act, 1999, that is Part X (Mortgages) is silent on the right of the mortgagee to institute an action to recover the money. This leaves open this right. The action can be instituted as an ordinary suit guided by the Civil Procedure Code (CPC).

⁹⁸ See Chapter Five, part 5.3.5 for the discussion of a third party mortgage.

⁹⁹ s. 126 (3) of the Land Act, 1999 (original text).

The action would be based on the general principle of law in regard to contract of money – that an acceptance of money carries with it an implied promise to repay. It is a personal promise. That promise gives the person to whom it is made (mortgagee) the right to proceed personally against the person who made the promise.

It is the suit which can be instituted as an alternative to exercising remedies under the mortgage or in the case of a shortfall after mortgage enforcement.

7.10 Abolished remedy: Foreclosure

Foreclosure was one of the mortgagee's remedies in Tanzania. It is a remedy which is now abolished by the Land Act, 1999 and hence the discussion about foreclosure is based entirely on the position at common law.

In its original term at common law, the mortgage was made in the form of a conditional conveyance in the sense that the parties agreed that once the mortgagor failed to pay the mortgage money or perform the conditions of the mortgage on the appointed date, the estate would vest to the mortgagee. This was an agreement between the parties but came to be modified by equity. Equity intervened in this bargain and stressed that a mortgage is a security and should remain as security. As a result, despite terms to the contrary equity afforded the mortgagor the equitable right to redeem the mortgaged property after the redemption date after paying the principal sum, interest and costs. However, because of the possibility of the equitable interference, problems arose where the mortgagor was not

willing to redeem as then the mortgagee could not sell or deal with the estate as his own.¹⁰⁰ One option open to the mortgagee was to obtain a necessary order to extinguish this equitable right to redeem and therefore vest the entire estate to him. Foreclosure was therefore the process where the mortgagor's equitable right to redeem was declared by the court to be extinguished.¹⁰¹ By instituting a foreclosure suit, the mortgagee would call the mortgagor to redeem within a certain time, under penalty of losing the right of redemption.

Foreclosure is done by the order of the court, not by any person,¹⁰² moved by the person seeking to foreclose. The court would make various orders – interim orders fixing a time for payment of the money. That was followed by the final order called foreclosure absolute which in form meant the mortgagor was not allowed to redeem at all.¹⁰³ It extinguished the mortgagor's equity of redemption and left the mortgagee the owner of the property both at law and in equity subject to any prior incumbrance.

Yet, even at common law, foreclosure as a remedy has lost its importance among others, due to its lack of finality. Even after the order of foreclosure absolute, the court can reopen the foreclosure in proper circumstances.¹⁰⁴ So instead of foreclosure, mortgagees choose to appoint a receiver or exercise their power of sale.¹⁰⁵

¹⁰⁰ *Campbell v Holyland* (1877) 7 Ch. 166 at 171.

¹⁰¹ M & W p. 1187.

¹⁰² See *Re Farnol Eades Irvine & Co. Ltd* [1915] 1 Ch. 22 at 24.

¹⁰³ The courts simply lift the bar it has put on the mortgagee's ability to extinguish the mortgagor's equity of redemption, See *Carter v Wake* (1877) 4 Ch.D 605 at 606, per Jessel M.R.

¹⁰⁴ M & W p. 1188. In *Campbell v Holyland* (1877) 7 Ch.D. 166 at 172, Jessel M.R. stated that "although the order of foreclosure absolute appeared to be a final order of the Court, it was not so, but the mortgagee still remained liable to be treated as mortgagee and the mortgagor still retained a claim to be treated as mortgagor, subject to the discretion of the Court. Therefore everybody who took an order for foreclosure

The mortgage practice in general is not well developed in Tanzania and foreclosure in particular is more or less unknown. But then section 125 (1) of the Land Act, 1999¹⁰⁶ stated that “any rule of law, written or unwritten, entitling a mortgagee (lender) to foreclose the equity of redemption in mortgage land is abolished”.

The abolition of foreclosure by the Land Act will not have any significant impact on the development of mortgage practice in the country. The remedy of foreclosure was part of legal practice but almost unknown. We have seen it is unattractive as a remedy. Indirectly, the abolition of foreclosure will cement the protection afforded to the purchaser of mortgaged land because under foreclosure a purchaser of foreclosed land runs a limited risk of the opening or reopening of the foreclosure order which led to the sale of the mortgaged land.¹⁰⁷ Lack of firm protection afforded to the purchasers of mortgaged land, and fear of or stigma towards mortgaged land affect mortgage business in Tanzania. The protection of the purchasers of mortgaged land is discussed in Chapter Eight, part 8.7 below.

It is important to note that section 125 (1) of the Land Act, 1999 simply abolished foreclosure of mortgaged land.

absolute knew that there was still a discretion in the Court to allow the mortgagor to redeem”. Examples given of circumstances which may make the court open foreclosure are where the mortgagor comes quickly (within reasonable time) after foreclosure, the promptness being measure against the nature of property or estates involved, or where the mortgagor was prevented from redeeming by an accident, see pp. 172 – 175.

¹⁰⁵ See *Palk v Mortgage Services Funding Plc* [1993] Ch. 330 at 336.

¹⁰⁶ Originally enacted under s. 124 (1) of the Land Act, 1999 (original text)

¹⁰⁷ The purchaser of the foreclosed estate is presumed to have some knowledge of the Courts’ discretion to open foreclosure, See *Campbell v Holyland* (1877) 7 Ch.D. 166 at 172.

CHAPTER EIGHT

MORTGAGEE'S POWER OF SALE

8.1 Introduction

We have seen in Chapter Seven above that where the mortgagee decides to fall on the mortgaged land, he can among other things sell the mortgaged land. The power of sale is important to the mortgagee because, unlike other remedies such as the appointment of a receiver or leasing of the mortgaged land a sale of the mortgaged land is relatively cheap and enables the mortgagee to effectively realize his security. However, sale when exercised has a far reaching impact on the mortgagor and the security as it extinguishes the security altogether. After the abolition of foreclosure,¹ sale is the only remedy in Tanzania which directly extinguishes the mortgagor's equity of redemption. As a result, when it is exercised, due processes have to be followed.

To answer the question as to whether a power of sale has arisen and (or) is exercisable necessarily requires an examination of the exercise of the power of sale, that is, the circumstances under which the mortgagee can sell the mortgaged land. Also an examination of the conditions which must be satisfied before sale and the mode of sale, the effect of sale to the mortgagee, mortgagor and the mortgaged land will be done below. An examination of the duties of the mortgagee who is selling, the protections afforded to the purchaser of mortgaged land and the manner in which the proceeds of sale

¹ See Chapter Seven, part 7.10.

have to be applied will be discussed in this part. In closing, we will look at some instances of sale such as the sale of a matrimonial home and the relief available to the mortgagor whose land is the subject of sale.

8.2 The exercise of the power of sale

A power of sale arises on default by the mortgagor in payment of the money owed or performance of the conditions of the mortgage. The situation is the same on a third party mortgage. Despite the fact that a third party mortgage is necessarily a tripartite agreement in the sense that the mortgagor charges his property to secure the debt of another (borrower), upon default by the borrower, the mortgaged land becomes liable to be sold by the mortgagee. Now as to whether that power is exercisable depends on the statutory stipulations or terms in the mortgage providing for the fulfillment of the conditions precedent to the exercise of the power of sale. As is the case with other remedies, where the power of sale has arisen, the mortgagee may decide not to exercise it. He may sit on it without forfeiting his power.²

While selling the mortgaged land, the mortgagee may rely on either his express power of sale as provided in the mortgage deed or his statutory power as laid down in the Land Act, 1999. Parties may say nothing in the mortgage or very little and rely on the statutory provisions of the Land Act, 1999. Parties may also rely on an express power of sale which incorporates statutory powers with or without amendments. The express power is

² See *Henderson v Astwood* [1894] AC 150 at 162, *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536, *Palk v Mortgage Services Funding Plc* (CA) [1993] Ch 330.

more flexible as it can be expanded or modified, compared to its statutory counterparts. However, the express power of sale can not replace the clear term of the law.

Section 132 of the Land Act, 1999 provides that the mortgagee may sell the mortgaged land upon default by the mortgagor. The expression used is “may”, correctly importing the assumption that the mortgagee may choose not to go for sale, but rather pursue other remedies. He may appoint a receiver or enter into possession, effect payment then exit. He may appoint a receiver or enter into possession then continue to sell. Ideally sale would follow a possession of the mortgaged land as that would guarantee vacant possession of the land.

However, if the mortgagee decides to sell, he must observe some conditions before sale. The mortgagee must observe the requirements of the law including the need to issue a notice to the mortgagor before sale. The requirement of notice is discussed below. The mortgagee will also have to observe the legal requirements as to the mode of sale and conditions and duties of the mortgagee selling. He will also have to make sure that the proceeds of sale are applied in the manner provided for in the Land Act, 1999.

Before the enactment of the Land Act, effectively the exercise of the power of sale was based on the practice at common law.³ At common law, long before the power of sale acquired statutory recognition, it was created by its insertion in the mortgage deed.⁴ This

³ For the exercise of the power of sale at common law, see F & L p. 379.

⁴ M & W p. 1191.

was an express power of sale.⁵ With the enactment of the Conveyancing and Law of Property Act, 1881 (Conveyancing Act, 1881)⁶ and later the Law of Property Act, 1925, the exercise of the power of sale by the mortgagee received its statutory seal. Despite the fact that the Law of Property Act, 1925 was not applicable in Tanzania, its predecessor the Conveyancing Act, 1881 was applicable.⁷ Hence the Conveyancing Act, 1881 and the mortgage practices at common law regulated sale of mortgaged land in Tanzania. The repealed Land Ordinance, Cap 113 was silent on the mortgagee's exercise of the power of sale, so also repealed Land (Law of Property and Conveyancing) Ordinance, Cap 114. Cap 114 simply provided a justification for the application of the English law of property in the country and hinted about mortgages but not about the mortgagees' remedies on default.

The Land Registration Ordinance, Cap 334 provided for procedural requirements and stipulated the effects of conveying the mortgaged land on a sale. It also provided for other matters related to mortgages such as consolidation and priority of mortgages. With the enactment of the Land Act, 1999, the statutory power of sale stems from the Act with other laws such as Cap. 334 simply complementing it. It has now partially consolidated a hitherto fragmented substantive and procedural law on the power of sale.⁸

⁵ See *Stevens v Theatres Ltd* [1903] 1 Ch 857 at 860.

⁶ 44 & 45 VICT.

⁷ The reception date for the application of the English laws of properties (real and personal property), mortgages, leases and tenancies, and trusts and trustees was the first day of January 1922. See s. 2 (1) of Cap. 114.

⁸ The Land Act, 1999 has repealed among others, Cap. 113 and Cap. 114, but retained Cap. 334 and the Registration of Documents Ordinance (Cap. 117). Its provisions are influenced by the general common law mortgage traditions. The Act contains provisions which incorporate in it the established basic principles of law and equity.

Where the mortgagee decides to exercise the power of sale, that sale may be of the whole or a part of the mortgaged land,⁹ subject to or free of any mortgage or other encumbrance having priority to the mortgagee's mortgage,¹⁰ by way of subdivision or otherwise.¹¹ The only division capable of being made is vertical division.¹² That contrasts with the possibility at common law and other jurisdictions where land can be subdivided both vertically and horizontally. Limiting only vertical division in Tanzania is outdated as it inhibits possibilities.

The mortgagee may sell by private contract or public auction,¹³ with or without reserve.¹⁴ Payment of the purchase price may be in one sum or by instalments.¹⁵ The mortgagee may also sell subject to any other conditions he may think fit, having due regard to the duty imposed by subsection (1) of section 133 to be discussed later.¹⁶

8.3 The requirement of notice before sale

In the law of mortgages, a notice before sale is intended to protect the rights of the mortgagor by warning and notifying him of the default. It is an announcement containing information about a future event telling the recipient what he should do and warning him of the consequences of failure to do what he is directed to do. Time is essential when it comes to notice. Notice should give the recipient a reasonable time to rectify the default

⁹ s. 134 (1) (a) of the Land Act, 1999.

¹⁰ s. 134 (1) (b).

¹¹ s. 134 (1) (c).

¹² See s. 53 of the Land Registration Ordinance (Cap. 334).

¹³ s. 134 (1) (d).

¹⁴ s. 134 (1) (e).

¹⁵ s. 134 (1) (f).

¹⁶ s. 134 (1) (g). See part 8.5 below for the duty of the mortgagee selling the mortgaged land.

because it is not always possible for the mortgagor to know whether he is in default and/or the extent of his default. As a result, failure to issue a notice before sale would be equivalent to ambush. Notice should therefore intimate to the mortgagor what needs to be done to avoid the consequences.

In Tanzanian circumstances where there are substantial numbers of people who are illiterate living in urban or semi-urban but unserviced areas, issuing of notices becomes a challenge. There is a real danger of not being able to locate the intended recipient. That creates the possibility of ambushing the mortgagor. However, as it was pointed out to me during the field research,¹⁷ despite the fact that the sale of the mortgaged land is preferred rather than other remedies such as appointment of a receiver, sale is normally preceded by communication and renegotiation aimed at giving the borrower more time to meet his obligation. Sale becomes a last resort in that sense. That practice limits the possibility of ambushing the mortgagor.

The Land Act, 1999 section 127 (1) requires the mortgagee to issue a notice before he can exercise his remedies under the mortgage. It states:

(1) “Where there is a default in the payment of any interest or any other payment or any part thereof or in fulfillment of any condition secured by any mortgage or in performance or observation of any covenant, express or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default.”

¹⁷ This fact was intimated to me by officials of the Tanzania Investment Bank, NBC and Eurafrikan Bank.

A notice required is a thirty days notice after which the mortgagee could proceed to sell the mortgaged land. Thirty days is a minimum time, but depending on circumstances such as the history of the borrower, or the sum involved, or the nature of the mortgaged land, a longer notice may be practicable.

Subsection (2) of section 127 provides for the contents of the notice. It states that the notice issued should inform the recipient of the following:

- (a) the nature and extent of default,
- (b) that the mortgagee may proceed to exercise his remedies against the mortgaged land,
- (c) that, after the expiry of thirty days following the receipt of the notice by the mortgagor, the mortgagee may exercise the right to sell the land.

Before the amendment of the Land Act, 1999 by Act No 2 of 2004, the Act provided for the requirement of successive notices before the mortgagee could proceed to sell the mortgaged land. The notices made sale as a remedy almost impossible to exercise. Until then, the mortgagee had to give a notice under section 125 now replaced by section 127.¹⁸ This was a general notice given where the borrower was in default and continued to be in default for one month. This notice was to be given thirty days or more after the default. The purpose of this notice was to urge the borrower to redress the default. The notice had

¹⁸ Form No. 45 of the Land (Forms) Regulations 2001, GN No. 71 of 2001.

to inform the borrower of the nature and extent of the default¹⁹ and if (i) the default consisted of non payment of any money due under the mortgage, the amount that had to be paid to rectify the default, and the time being not less than three months by the end of which the payment in default was to be completed.²⁰ On the other hand, if (ii) the default consisted of failure to perform or observe any covenant in the mortgage, the notice had to inform him of what he (borrower) was to do or abstain from doing so as to rectify the default, the time being not less than two months by the end of which the default had to be rectified.²¹

The language of section 125 (1) was “may”, that “the lender may serve on the borrower a notice”. It almost imports an assumption that the notice was discretionary. But then there was required to be a specific notice if the mortgagee decided to sell the mortgaged land. Subsection (1) of section 131 provided that after the expiry of the time provided for rectification of the default in the notice under subsection (1) of section 125, a lender may exercise his power to sell the mortgaged land. Before exercising that power, subsection (2) required him to serve on the borrower a notice to sell.²² The mortgagee was not to proceed with any sale of the mortgaged land until forty days had elapsed from the date of the service of the notice to sell.²³ A copy of this latter notice was to be served on the Commissioner where the mortgaged land was held for a granted right of occupancy, or the village council of the village where the mortgaged land was located where that land

¹⁹ s. 125 (2) (a) of the Land Act 1999 (original text).

²⁰ s. 125 (2) (b) of the Land Act 1999 (original text).

²¹ s. 125 (2) (c) of the Land Act 1999 (original text). Also note s. 125 (3) of the Land Act 1999 (original text).

²² Form No. 51 of the Land (Forms) Regulations 2001, GN No. 71 of 2001.

²³ Note the discrepancy between subsection (2) of section 131 which mentioned 40 days and Form No 51 (under section 131) which mentioned 45 days.

was held for a customary right of occupancy or customary tenure. Also where the mortgaged land was a lease, a copy had to be served on the holder of the right of occupancy out of which the lease had been granted; on any spouse of the borrower; to any lessee and sub lessee of the mortgaged land or of any buildings on the mortgaged land; on any person who was occupier with the borrower.

Furthermore, a copy of notice had to be served on any other lenders of money secured by a mortgage of the mortgaged land of which the lender was proposing to exercise the power of sale, or on any guarantor of the moneys advanced under the mortgage, or on any other person with the right to enter on and use the land or natural resources in, on, or under the mortgaged land; and lastly on such other persons as may be prescribed by the regulations.²⁴ After serving copies of that notice, the mortgagee had to make sure that a copy of the notice was posted in a prominent place at or as near as possible to the mortgaged land. The whole process was a tedious one indeed taking into account imminent legal challenges from the borrowers or other interested parties.

Ideally the mortgagee would enter into possession before sale or would appoint a receiver before sale. Before the amendment of the Land Act, the time under which the mortgagee could actually come to sell the mortgaged land would have to include a waiting time required for specific notices when a mortgagee was to enter into possession and/or appoint a receiver and then sell.

²⁴ See s. 131 (3) (a) – (j) of the Land Act, 1999 (original text).

As observed above, the time during which the mortgagee was required to wait after default to sell has been drastically reduced. There is no longer a need for successive notices. There is also no longer a requirement to disseminate copies of a notice to other parties as was the case. Only one notice is required and the mortgagee can sell thirty days after the expiry of that notice.²⁵

The requirement of a notice in general, a notification which would prepare the recipient for the consequences of his conduct, conforms to the understanding of good conduct. A requirement of too long a notice is almost a denial of the right to sell, but too short may result in injustice. Even before the enactment of the Land Act, 1999 a notice before a mortgagee could sell was necessary. The mortgagee relying on an express provision in the mortgage deed was required to give a notice and hence he could only sell after the expiry of the time specified in the notice.

Some cases which were decided before the enactment of the Land Act, 1999 support this position. In *NBC v Walter T. Czurn*,²⁶ a notice of sale was wrongly addressed so that it did not reach the mortgagor. It was held that the bank had no legal right to sell the mortgaged property and thus there was no sale at all. It was concluded that the mortgaged property sold prior to fulfillment of the condition precedent of issue of notice was not legally sold and therefore no title was passed to the purchaser.

²⁵ Note if he has to sell by public auction, procedures as to sell by public auction must be complied with.

²⁶ Court of Appeal of Tanzania at Dar es salaam, Civil Appeal No. 31 of 1995 (unreported), in Mshana, E. S. Mortgage of a right of occupancy in Tanzania: the mortgagee remedy of sale of the mortgaged land, University of Dar es salaam, 2002 (thesis) at 37.

The decision reiterated the need for notice before sale. It refutes the unfounded argument that the mortgagee need not give a notice after all because the mortgagor ought to know whether he was in default or not. We have seen that in Tanzanian circumstances, it is possible to have a mortgagor who is not aware whether he is in default, or if he is aware, the extent of his default. The mortgagor has a right to be informed of a course of action which will be taken by the mortgagee and, if the action is a serious remedy such as sale, the terms upon which the property would be sold.²⁷

8.4 Mode of sale

Different manners of sale of the mortgaged land attract different levels of scrutiny of the exercise of the power, and lead to the need to fulfill different duties and procedural requirements. The law provides that the mortgagee can sell the mortgaged land either by private contract or by public auction.²⁸ Sale by private contract, because of its very nature, attracts more scrutiny than sale by public auction. The Land Act, 1999 provides a guide when the mortgagee decides to sell by public auction.

It is provided that where a sale is to proceed by public auction the mortgagee has to ensure that the sale is publicly advertised in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the mortgaged land.²⁹ The mortgagee selling has to observe the requirement of section 52 of the Land Act, 1999 relating to auctions and tenders for right of occupancy if applicable. Section 52, among

²⁷ See *Cockburn v Edwards* (1881) 18 ChD 449.

²⁸ s. 134 (1) (d) of the Land Act, 1999.

²⁹ s. 134 (2) of the Land Act, 1999.

other, empowers the Minister for Lands to make regulations for the conduct of auctions and tenders. Under the said section, the Land (Conduct of Auctions and Tenders) Regulations, 2001³⁰ was made.

The regulations require that the auction must be conducted by an agent being a licensed land broker, real estate agent or Court Broker.³¹ The agent must publish in one Swahili and one English daily circulating newspaper in the district and on the public notice boards the date of the auction which shall be not less than twenty one (21) days before the auctions as well as conditions of the auction.³² Publishing the auction in the daily newspaper and on the public notice boards may likely bring the auction to the attention of persons likely to be interested in bidding. In addition, publishing the auction in the manner and form so as to bring it to the attention of potential buyers should also include the requirement to make sure that the publication contains the right or necessary information and descriptions of the property. This is because if proper information or particulars of mortgaged land are not contained in the publication, the publication may not reach potential bidders. The same may be the situation where wrong particulars of the property for sale are published. These deficiencies may affect attendance at the auction and ultimately the price secured. If the price secured is less than the market price, the mortgagee may be held responsible. The duty to obtain the best price obtainable is discussed in part 8.5 below.

³⁰ GN No. 73 of 2001.

³¹ Regulation 5 of GN No. 73 of 2001.

³² Regulation 6 of GN No. 73 of 2001.

The agent or the mortgagee selling by auction may sell with or without a reserved price. If no price is fixed, the highest bidder is likely to be the winner, but once the reserved price is fixed, the winner is the highest bidder whose bid is higher than the reserved price.³³ On the later, the mortgagee can not sell unless the bid is higher than the reserved price. If the reserved price is not reached, the auction will be repeated on subsequent occasions until a winner is found.³⁴ The mortgagee can bid and purchase the mortgaged land himself. He can only do that as long as the price bid for the mortgaged land by the mortgagee is the highest price bid for that land at the auction,³⁵ or the price is equal to or higher than the reserve price, if any, put upon the land before the auction,³⁶ whichever amount is greater. In like manner if he chooses to sell by private contract, he can still sell it to himself.³⁷

Sale of the mortgaged land is done out of court normally preceded by a possession of the land. However, there is a category of sale which would require the involvement of the court.³⁸ Subsection (2) of section 132 states that a mortgagee shall not exercise the power of sale in relation to any land as referred to in paragraphs (a), (b) or (c) of subsection (5) of section 130 without first having obtained an order of the court for possession of the land or having taken possession in the manner prescribed in paragraph (b) of subsection (2) of section 130. Section 130 (5) states that a mortgagee shall not otherwise than

³³ Regulation 9 of GN No. 73 of 2001.

³⁴ Regulation 11 of GN No. 73 of 2001.

³⁵ s. 136 (3) (a) of the Land Act, 1999.

³⁶ s. 136 (3) (b) of the Land Act, 1999. Compare s. 136 (3) (b) with regulations 9 and 11 of GN No. 73 of 2001 which mention the sale to a bidder with a bid which is higher (not equal) than the reserved price.

³⁷ s. 136 (1) of the Land Act, 1999.

³⁸ s. 132 (2) of the Land Act, 1999.

through the execution of an order of a court enter into or seek to enter into possession by taking physical possession of –

(e) a dwelling house in which any person is in residence; or

(f) any land in actual use for agricultural purposes; or

(g) any land in actual use for pastoral purposes.

It is a closed category of property in which the occupier or his dependants are likely to depend entirely for their livelihood or well being. When the above mentioned properties become liable to be sold, the mortgagee must seek an order of the court before he can first enter into a physical possession and then sell.

Similarly if the land liable to be sold is held under a customary right of occupancy, the law provides that such sale should be made to any person or group of persons referred to in section 30 of the Village Land Act, 1999.³⁹ The exercise of sale of mortgaged land under customary law is discussed in part 8.9.2 below.

8.5 Duty of the mortgagee selling the mortgaged land

As has been observed many times, the mortgagee is not a trustee of the power of sale for the mortgagor. The power of sale is given to him to realize his debt more effectively and in case of a shortfall, the mortgagor is liable personally for the deficit. The mortgagee

³⁹ See s. 126 (d) of the Land Act, 1999.

may decide to sit and not sell the mortgaged land. The position is summarized well in *Cuckmere Brick Co. v Mutual Finance Ltd*⁴⁰ where Salmon L. J. stated:

“Once the power [of sale] has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realize his security by turning it into money when he likes.”

Where the mortgagee decides to sell, he must observe duties imposed on him. The duties seek to protect the mortgagor against fraud or negligence or collusion etc by the mortgagee during sale which would prejudice the mortgagor and those who are interested in the mortgaged land.

The mortgagee's interest during sale takes precedence, but he owes a duty towards the mortgagor. At common law, the duty of the mortgagee was pegged at the need for him to act in good faith alone.⁴¹ It was observed in *Kennedy v De Trafford*⁴² that the only obligation incumbent on a mortgagee selling under and in pursuance of a power of a sale in his mortgage is that he should act in good faith. In principle by acting in good faith, the mortgagee was to act fairly. He was to do nothing but properly exercise the power of sale vested in him under the mortgage. He was not to act fraudulently or willfully or recklessly in a manner which would sacrifice the interest of the mortgagor. As much as

⁴⁰ [1971] 1 Ch. 949 at 965.

⁴¹ See F & L p. 388. See also observation of Salmon LJ in *Cuckmere Brick Co. v Mutual Finance Ltd* [1971] 1 Ch. 949 at 966.

⁴² [1897] AC 180 at 185.

he exercised the power for the purpose of realizing his security, the duty was presumed discharged.

The reliance on good faith alone was insufficient. There was therefore an addition of the duty which complemented the duty to act in good faith. That is a duty to take reasonable care to obtain the proper (true) market value of the mortgaged property at the time of sale. In *Farrar v Farrar, Ltd*⁴³ it was observed that if the mortgagee in exercise of his power acts *bona fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtainable for the property if the sale had been postponed. Then in *McHugh v Union Bank of Canada*⁴⁴ it was stated that it is well established law that it is the duty of the mortgagee when realizing the mortgaged property by sale to behave as a reasonable man would behave in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold. The position was further reiterated in *Palk v Mortgage Services Funding Plc.*⁴⁵ The established position at common law is that the mortgagee when exercising the power of sale owes a duty of care to the mortgagor, and the guarantor of the mortgage debt if any, to take reasonable care to obtain a proper price. The burden of proof is on the mortgagor or the person who alleges the breach of the duty.⁴⁶

⁴³ (1888) 40 Ch.D 395 at 411.

⁴⁴ [1913] AC 299 at 311.

⁴⁵ [1993] Ch. 330 at 338.

⁴⁶ F & L p. 389.

Where the mortgagee does not sell and the value of the property depreciates, will he be presumed to be in breach of his duty? The fact that the mortgagee is required to obtain the proper market price at the time of sale, does not mean he can be forced to sell at a particular time. The mortgagee may decide in his own interest when he should sell or whether to sell at all. The concerned mortgagor or guarantor would have to act on this occasion. The guarantor can request the mortgagee to sell and if the mortgagee does not sell, the guarantor may pay off the debt and himself sell the mortgaged land.⁴⁷ This is because if he does not sell and the value of the land or the property liable for sale depreciates, the mortgagee incurs no liability to the mortgagor. Yet if there is a deficit after sale, the mortgagee will still be entitled to his remedy on a personal covenant against the mortgagor and any surety of the mortgagor.

I have dealt with the position at common law rather substantially because of the language of the provisions of the Land Act, 1999 as amended which imposes a similar duty. The duty is set out in section 133 (1) which reproduces its predecessor section 132 (1) of the Land Act, 1999.⁴⁸ Section 133 states:

(1) A mortgagee who exercises a power to sell the mortgaged land, including the exercise of the power to sell in pursuance of an order of the court, owes a duty of care to the mortgagor, any guarantor of the whole or any part of sums advanced to the mortgagor, [and] any lender under a subsequent mortgage including a customary mortgage or under a lien to obtain the best price reasonably obtainable at the time of sale.

⁴⁷ See *China and South Sea Bank Ltd v Tan* [1990] 1 AC 536 at 545.

⁴⁸ Original text.

The description “best price” suggests a higher price. It is the best price obtainable. Now what is consequence of failure to exercise the duty to obtain the best price? Does the mortgagee become chargeable with the full sum which he should have obtained but for the breach of duty, or is the sale null and void? The proper course if relevant should be in the alternative in the sense that the sale can either be invalidated or the mortgagor can seek an account of what the property could have fetched if the duty was observed. However, there is a shortage of Tanzanian decided cases on this subject.⁴⁹ In *M/S Ilabila Industries Ltd and Others v Tanzania Investment Bank and Another*,⁵⁰ the applicant prayed among others, for the court to declare the sale by the mortgagee null and void for breach of duty under section 132 (now section 133) of the Land Act, 1999. After holding that the mortgagee was not in breach of the duty, the court did not proceed to state the consequences of the breach.

One may question when the duty of the mortgagee selling begins? Does it start from the time he enters into possession if he does or from the time he advertises the sale of the mortgaged land? We have seen in part 8.4 above that advertisement of the sale of the mortgaged land by public auction is necessary. In that sense should the mortgagee be held responsible for failure to obtain the best price because of a failure to advertise the sale in a manner and form which was likely to bring it to the attention of potential buyers? In other words, should the mortgagee be debited with the price which they could and should have obtained for the land if the sale was advertised properly? I am not aware of any direct or indirect authority on this issue, but in my view the answer is in the

⁴⁹ I am not aware of any case where this issue was directly discussed.

⁵⁰ The High Court of Tanzania (Commercial Division) at Dar es Salaam, Commercial Case No. 27 of 2002, ruling per Kalegeya J. (unreported).

affirmative. In *M/S Ilabila Industries Ltd* case the manner in which the auction was conducted and its effect on the price secured was examined, but not the advertisement process. Unless the advertisement process was in order, a failure to examine the advertisement before sale was an oversight on the applicant's side. The advertisement is a prerequisite condition for sale by public auction. The two are intertwined. The manner in which particulars of the mortgaged land were published, should be the first point in case of the need to investigate whether the mortgagee has observed the duties of the mortgagee selling. Failure to advertise the sale properly is a breach a duty to obtain the best price reasonably obtainable at the time of sale. As a result, the consequences of the breach of the duty, apply where the price secured was affected by improper advertisement.

The questions raised above have been considered at common law. In *Tomlin v Luce*⁵¹ the plaintiff discovered that the mortgagee had misdescribed the property offered for sale. The misstatement was done by the auctioneer. It was held that:

“(the) mortgagees are answerable for any loss which was occasioned by the blunder made by the auctioneer at the sale. It may be that there was no loss. It may be on the other hand that there was considerable loss occasioned by it,... the value of a misstatement depends upon what would have been given by a purchaser for the property ...”

The same views were expressed in the decision of the Privy Council in *McHugh v Union Bank of Canada*⁵² and *National Bank of Australasia v United Hand in Hand and Band of*

⁵¹ (1889) 43 Ch.D 191 at 194 per Cotton L.J.

*Hope Co.*⁵³ where it was concluded that the mortgagee is chargeable with the full value of the mortgaged property sold if, from want of due care and diligence, it has been sold at an undervalue.

Similarly in the *Cuckmere Brick Co case*⁵⁴ after holding the mortgagee was in breach of the duty of care to obtain the proper price because of omission of important particulars of sale, it was stated:

“There is no doubt that a mortgagee who takes possession of the security with a view to selling it has to account to the mortgagor for any loss occurring through his negligence or the negligence of his agent in dealing with the property between the date of his taking of possession of it and the date of the sale.”

The loss occasioned is a matter of fact. There is a duty to establish the fact that the mortgagor has suffered loss because of the breach, that the property would have fetched more than what it has secured. Then an analysis is necessary as to whether the mortgagee has breached his duty.

In the following part, we will examine a test in place to determine whether the mortgagee has discharged or breached the duty to obtain the best price obtainable at the time of sale.

⁵² [1913] AC 299.

⁵³ (1879) 4 App. Cas. 391.

⁵⁴ At p. 972 per Cross L.J.

8.5.1 Discharge or breach of duty to obtain the best price reasonably obtainable at the time of sale

In the previous part we have seen the duty of the mortgagee selling both at common law and under the Land Act, 1999. At common law, the mortgagee is required to obtain the proper market price of the mortgaged property.⁵⁵ The Land Act simply provides for the duty to obtain the best price reasonably obtainable at the time of sale. As we have said above, the expression the best price connotes the highest price obtainable. It is a price which will reflect the true value of the mortgaged land.

To arrive at the true or current market value of the land or property requires a process of valuation. The valuation will have to take into account the nature of the property, its location and title, the state of the market and the country's financial environment at the time. One may also want to consider the attitude of potential buyers of mortgaged property.

When is the duty imposed by section 133 (1), that is, the duty to obtain the best price reasonably obtainable at the time of sale, discharged or breached? Subsection (2) of section 133 provides one presumption by setting a percentage device below which the presumption is activated. It states:

⁵⁵ See *Palk v Mortgage Services Funding Plc* (CA) [1993] Ch 330 at 338. Expression of similar meaning used are the duty to obtain a current market price, see *China & South Sea Bank v Tan* (PC) [1990] 1 AC 536 at 545; or true market value, see *Cuckmere Brick Co. v Mutual Finance Ltd* [1971] 1 Ch. 949 at 966 per Salmon L.J.

(2) Where the price at which the mortgaged land is sold is twenty-five per centum or more below the average price at which comparable interests in land of the same character and quality are being sold in the open market, there shall be a rebuttable presumption that the mortgagee is in breach of the duty imposed by subsection (1) and the mortgagor whose mortgaged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a mortgaged land is sold by the mortgagee at an undervalue being less than twenty-five per centum below the market price shall not be taken to mean that the mortgagee has complied with the duty imposed by subsection (1).

The percentage device increases downward against the average price. This means 25% below the average price of say 1,000 shs would be 750 shs, while 30% below the average price would be 700 shs and so on. It is unfortunate provision which nevertheless reflects the spirit of the act, that is, to protect the interests of the borrowers. The following can be deduced from the provision:

- It set a percentage threshold being twenty five percent or more below the average price at which the presumption is triggered.
- The expression “twenty-five per centum or more below the average price...” signifies that the scale is tipped downward or increases downward against the average price.

- The subsection compares with the twenty five per centum or more below the average price at which comparable interests in land of the same character and quality is being sold in the open market. The comparison is problematic taking into account the diverse nature of property in the country. The comparison if necessary should have been simply against the market price. To arrive at the current market price, it is common to compare the property offered for sale with other properties of the same character and quality in the area either sold during the relevant period or not.
- The burden of proof as in all civil matters is on the person who alleges.⁵⁶
- The expression “being sold” presupposes a mortgagor challenging the incomplete sale beforehand or immediately afterwards. This may suggest that the mortgagor seeking to challenge sale after it happened may not benefit from subsection (2). This can not be the case. Therefore the expression “are being sold or have been sold” would have been clear.
- The proviso to subsection (2) envisages a situation where the price secured is less than 25% below the average price, but not 100%. The proviso clarifies a situation where the price obtained is say 10% below the average price. In that situation it is emphasized the price should not be taken to mean that the mortgagee has complied with the duty imposed by subsection (1).

⁵⁶ *M/S Ilabila Industries Ltd and Others v Tanzania Investment Bank and Another*, the High Court of Tanzania (Commercial Division) at Dar es Salaam, Commercial Case No. 27 of 2002, ruling per Kalegeya J. (unreported) at 16.

Setting the percentage threshold is a problem in Tanzania. The market should guide and not an arbitrary consideration. As was observed in the field research it is difficult, almost impossible to secure the market value of the mortgaged land sold or get more than the value of the land or house offered for sale. This is a result of among others, the volatile (unstable) nature of the property market, or the acceptance of securities in unserviced areas or because of the very nature of the sale of the mortgaged land. There is an attitude of the potential buyers towards mortgaged land. Some people think because a sale by the bank is a constrained sale, they can get it cheap. There is also genuine fear of buying a mortgaged land thinking it is like buying a lawsuit⁵⁷

The reach of section 133 (2) of the Land Act, 1999 was considered in the ruling of the Commercial Court in the *M/S Ilabila Industries Ltd and Others v Tanzania Investment Bank and Another*.⁵⁸ The applicants whose mortgaged land was sold by the respondents urged the court to declare the sale null and void. One of the allegations was that the mortgaged land was undervalued and sold at a low price compared to its value. As a result, it was submitted that the respondent (mortgagee) was in breach of a duty to sell at the best price reasonably obtainable. In giving effect to section 132 (2) of the Land Act, 1999 now reproduced in section 133 (2), it was correctly stated that the application of this section would involve two things. First, the person seeking the assistance of the provision must establish facts (factual analysis) of the value of the property. As a result, anyone seeking to invoke section 132 (2) must show proof of the value of the property,

⁵⁷ This was revealed to me during my meeting in Tanzania with officials of Tanzania Investment Bank, NBC, Standard Chartered Bank and Stanbic Bank.

⁵⁸ The High Court of Tanzania (Commercial Division) at Dar es Salaam, Commercial Case No. 27 of 2002, ruling per Kalegeya J. (unreported).

professionally arrived at. A mere assertion of the value of the property is not entertained.⁵⁹ The second process involves an analysis of the price secured against the market price (average price) to show whether the price secured is 25% or more below the average price. If it shows the price secured is 25% or more below the average price that would be subject to the rebuttable presumption provided in the provision.

However, the court proceeded wrongly stating that “where the price secured is less than 25% of the value, there is a rebuttable presumption that the lender did not exercise the duty of care imposed on him to obtain the best price reasonably obtainable at the time of sale.”⁶⁰ The expression used in the subsection is “25% or more below the average price” and not “less than 25% of the value”. The two expressions mean different things. Each path leads a different direction. Having taken a wrong path, it was stated that:

“Thus, there is no evidence that shs. 143 million is less than 25% of the value of the property sold. That apart, even if we were to hold that the value of the property is shs. 500 million or shs. 391 million, Mr Maira’s argument (counsel for applicants) would still stand unsupported because 25% of the former would be shs. 125 million while it would be shs. 97,750,000 for the latter. Here, what was secured is much higher – shs. 143 million which is 28.6% of shs. 500 million.”

The 25% or 28% of the value of property worth shs 500 million is shs 125 and 140 million respectively. But 25% below the value of property worth shs 500 million is shs 375 million and 143 million is 71.4% below the price. After establishing that the price

⁵⁹ At p. 14.

⁶⁰ At p. 15.

secured is not less than the 25% of the value of the auctioned property, it was stated by the way of obiter that:⁶¹

“In our case, apart from what I have already said, that there is no proof that shs. 143 million is less than 25% of the value of the auctioned property, even if it had been so established, the auction having properly been conducted and in the circumstances, the Respondents cannot be said not to have acted to obtain the best price reasonably obtainable at the time of sale as that is the price obtained at the public auction as per market forces existing at the scene.”

In any case, the presumption is rebuttable. In reaching its decision, the court would look at things such as the mode of sale used and the obtaining circumstances. More care and scrutiny would be required in sales done by private contract than in public auction. As a result, even if the price secured is 25% or more below the average price but the sale was done by public auction and it is established that the same was properly conducted, by a court broker, with a proper court order if needed, having passed through a legal procedure and that there is no fraud or irregularity, the lender would be considered to have discharged the rebuttable presumption of breach of duty imposed on him.

The twenty five percentages should always be tested against the current market price because the current market price reflects the reality on the ground. One may also need to take into account the costs of realisation that is the costs which the mortgagee may incur before the sale.⁶²

⁶¹ At p. 16.

⁶² See *McHugh v Union Bank of Canada* [1913] AC 299 at 312.

The inclusion of subsection (2) of section 133 was unnecessary. It is true that the subsection seeks to protect the mortgagor because if the mortgagee acts carelessly in the sense that he fails to secure a price which could satisfy the debt, the mortgagor will still remain liable for the deficit. Already, the 25% requirement is a burden to bankers selling the mortgaged land. It may probably be useful now as the mortgage practice is yet to mature, but in the long run, that requirement will inhibit a free development of mortgage practice in the country. The objectives of subsection (2) of section 133 would be taken care of by subsection (1) of section 133 of the Land Act, 1999.

8.6 Sale by the mortgagee to himself

A situation may arise where a mortgagee selling the mortgaged land wishes to purchase the very land he is selling. There is a contrary position between Tanzania and common law in regard to the power of the mortgagee to purchase the mortgaged land. Unlike at common law where the mortgagee selling may not purchase the mortgaged land unless he obtains leave of the court,⁶³ under the Land Act he can.

Fisher and Lightwood summarize the common law position regarding the power of the mortgagee to sell to himself the mortgaged land.⁶⁴ The position is that unless he obtains leave of the court, the mortgagee can not sell to himself the mortgaged land either alone or with others, nor to any trustee for himself. Similarly, the mortgagee can neither sell to

⁶³ See *Palk v Mortgage Services Funding Plc* [1993] Ch. 330 at 340. Sir Donald Nicholls v.-C., after stating that the mortgagee can buy the mortgaged land in this occasion gave the reason for holding so. It was stated that "The mortgagee can buy the property. A mortgagee cannot buy the property from itself, but here the sale is directed by the court; it is not a sale by a mortgagee in exercise of its own power of sale."

⁶⁴ F & L p. 393.

any person employed by him to conduct the sale. In general, the limitation aims to limit a conflict of interest where a seller becomes a buyer. The mortgagee as a vendor (seller) would normally be interested in obtaining the highest price but by bidding to buy and become a purchaser, the mortgagee (as a purchaser) would be interested to pay the lowest price. Such a transaction would have a suspicious face.

The position is explained in *Farrars v Farrars, Limited*⁶⁵ where it was stated that a sale by a person to himself is no sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at the price fixed by himself, even though such a price be the full value of the property. The rule which prevents the mortgagee from purchasing applies to any officer of the mortgagee or the solicitor or other agent who is acting for the mortgagee in the matter of the sale or a servant of the mortgagee, but not to the solicitor who acted in the matter of the mortgage.⁶⁶

However, a sale by a person to a corporation of which he is a member is not a sale by a person to himself. The reason is that the corporation is a legal person independent from its shareholder or persons composing it. The only time where a sale by the mortgagee to a corporation in which he is a member can be impeached is when the sale was conducted fraudulently and at an undervalue, or where the sale was made in circumstances which throw upon the purchasing company the burden of proving the validity of the transaction,⁶⁷ or where the sale was not in good faith and that the mortgagee did not take

⁶⁵ (1888) 40 ChD 395 at 409.

⁶⁶ F & L p. 393, 394.

⁶⁷ *Farrars v Farrars, Limited* (1888) 40 ChD 395 at 410.

reasonable precautions to obtain the best price reasonably obtainable at the time of sale.⁶⁸

On the other hand, the mortgagor or any of the co-mortgagors can purchase the mortgaged land.

We have seen in part 8.4 above that the mortgagee can sell the land either by private contract or by public auction. The Land Act, 1999 authorizes the mortgagee to sell to himself the mortgaged land by public auction. The conditions are contained in section 136 which reproduced section 135 of the Land Act (original text). Section 136 (1) states that a mortgagee exercising the power of sale may sell to himself, other than in the circumstances provided for in subsection (3), only if a court gives him leave to do so. Subsection (3) of section 136 states that:

(3) Where the mortgaged land is sold by public auction, the mortgagee may bid for and purchase the mortgaged land at that public auction so long as the price bid for the mortgaged land by the mortgagee is –

(a) the highest price bid for that land at the auction, or

(b) equal to or higher than the reserve price, if any, put upon the land before the auction, whichever amount is greater.

However, when the mortgagee sells other than by public auction such as by private treaty, he can only sell to himself with leave of the court. There is a condition imposed on the

⁶⁸ *Tse Kwong Lam v Wong Chit Sen and Others* [1983] 3 All ER 54 at 59.

court before granting such a leave to purchase. The condition is provided under subsection (2) of section 136 which states:

(2) A court shall not grant leave unless the mortgagee satisfies such court that a sale of the mortgaged land to himself is the most advantageous way of selling the land so as to comply with the duty imposed on the mortgagee by subsection (1) of section 133.⁶⁹

Still the law empowers the Registrar to inquire whether the provisions of section 136 have been complied with before he can register as the new owner a mortgagee who has sold the mortgaged land to himself.⁷⁰

8.7 Protection of purchaser

On a sale by the mortgagee the purchaser will be especially concerned to know the nature of title he will be receiving. The purchaser needs to know whether he is getting an absolute title which binds the mortgagor or a title subject to the mortgage liable to be set aside in the future by the mortgagor or his successor in title after paying the principal, interest, and costs. The analysis of the protection of purchasers of mortgaged land or property in general is relevant not only where the mortgagee has exercised improperly his power to sell the mortgaged land, but also where the power of sale was exercised properly in the sense that the power had arisen and that the prerequisite conditions of sale were followed.

⁶⁹ For the duty under s. 133 (1), see part 8.5 above.

⁷⁰ See s. 136 (4) of the Land Act, 1999.

Ordinarily, the mortgagee needs to be able to promise that the title he is conveying during sale is absolute. Short of that would make it impossible for the mortgagee to sell the mortgaged land and probably affect the lending – borrowing businesses. Already there is a negative feeling among Tanzanians toward purchasing mortgaged property. In most cases the mortgaged property for sale is commonly referred to as *nyumba yenye kesi*. This is a negative Swahili expression which associates a mortgaged property or buying such a property to a lawsuit. As it was observed in the field research, to many people, buying a mortgaged property is like buying a lawsuit.

Sale whether out of court or by order of the court should afford protection to the purchaser from the time when the contract is entered into until completion by registration of the title to the Registrar of Titles.⁷¹ The question of protection of the purchaser centres on validity or legality of the mortgage⁷² and the availability of the power of sale. There are valid mortgages as opposed to invalid ones.⁷³ If the mortgage is invalid or made invalid for reasons such as lack of registration, the defect may leave the mortgagee without title to pass. In addition, the mortgagee may not have a good title to pass by sale if he contracted not to sell.⁷⁴ This will make the whole question of the protection of the purchaser redundant.

⁷¹ As was observed in the field research, completion of conveyance by registration of title in the Land Registry can take long time.

⁷² For this purpose invalid mortgages comprise defectives mortgages for one reason or another leaving the mortgagee without title to pass.

⁷³ See Chapter Five, part 5.6.

⁷⁴ See *Shinyanga Regional Trading Co Ltd and Another v National Bank of Commerce* [1997] TLR 78.

In Tanzania, protection of purchasers is provided by section 135 of the Land Act, 1999. In effect section 135 reproduces section 134 of the original text of the Land Act. Section 135 provides the following. Firstly, it identifies persons protected by its provisions. Subsection (1) states: this section applies to –

- (a) a person who purchases mortgaged land from the mortgagee or receiver, excluding a case where the mortgagee is the purchaser;
- (b) a person claiming the mortgaged land through the person who purchases mortgaged land from the mortgagee or receiver, including a person claiming through the mortgagee where the mortgagee is the purchaser where, in such a case, the person so claiming obtained the mortgaged land in good faith and for value.

The provisions differentiate between an ordinary purchaser and the mortgagee purchasing. As we have seen in part 8.6 above, the mortgagee can sell the mortgaged land to himself. In that situation, protections normally afforded to ordinary purchasers are not available to him. The waiver of protection to the mortgagee purchasing is an important check on the mortgagee's conduct. The mortgagee selling is under duties to observe conditions before sale. But in case there were irregularities in a sale and the mortgagee is the purchaser, he is presumed to have knowledge of the irregularities and hence is not immune from the mortgagor's challenge. However, the transferee of the mortgaged land from a mortgagee who is the purchaser is in the category of persons protected by section 135 (1). This later situation creates a possibility of a scheme in which the mortgagee

purchases the mortgaged land and then conveys it to a third person. If such a person obtains the land in good faith and for value, he will belong to a category of persons who are protected under section 135 (1).

Secondly, section 135 spells out the range of protections and the effect of the conveyance. It makes it unnecessary for the purchaser to investigate the manner in which the power of sale was exercised, its validity or invalidity before and pending the completion of the sale. The provision does not replace but rather complements the normal way of conducting business. It is normal for a purchaser of real property to investigate whether a vendor has a title to pass or not. Subsections (2) and (3) of section 135 provide that:

(2) A person to whom this section applies –

- (a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the mortgaged land;
- (b) is not obliged to see to the application of the purchase price;
- (c) is not obliged to inquire whether there has been a default by the mortgagor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, he has actual notice that there has not been a default by the mortgagor, or that a notice has not been duly served or that the sale is in some way unnecessary, improper or irregular, except in case of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which that person has actual or constructive notice.

The purchaser is correctly not obliged to oversee the application of the proceeds of sale.⁷⁵ Furthermore, the provision does not require the purchaser to inquire whether the power of sale has become exercisable or has been exercised properly. He is protected even if he acquires actual notice of irregularities before the completion of the sale, that is, where the contract for sale has been entered pending completion by registration of the title in the Land Registry. The protection afforded to the purchaser pending completion is waived in the case of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which he the purchaser has actual or constructive notice.

Subsection (3) which extends protections to the purchaser who acquires knowledge of impropriety pending completion distinguishes the Tanzanian position from that at common law. At common law, knowledge of impropriety pending completion may impeach the sale. Notable is the statement by Crossman J. in *Waring v London and Manchester Assurance Co. Ltd.*⁷⁶ In interpreting section 104 (2) of the Law of Property Act, 1925 (England), he stated, “Its purpose (i.e. section 104 (2)) is simply to protect the

⁷⁵ See part 8.8 below for the discussion on the application of the proceeds of sale.

⁷⁶ [1935] 1 Ch. 310.

purchaser and to make it unnecessary for him, pending completion and during investigation of title, to ascertain whether the power has become exercisable.” It was stated further that “Of course if the purchaser becomes aware, during that period, of any facts showing that the power of sale is not exercisable, or that there is some impropriety in the sale, then, in my judgment, he gets no good title in taking the conveyance”.⁷⁷

The quotation above makes it prudent for the purchaser at common law not to inquire into the propriety of the sale. In Tanzania, the Land Act does not clarify the matter. Despite the fact that the purchaser is not obliged to inquire whether there has been a default by the mortgagor or whether notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular, it is not clear what would be the position if the fact of irregularity or impropriety of the sale comes to the purchaser’s knowledge? In other words if the purchaser acquires notice of irregularity before sale would he still be protected by the provisions of section 135 (2) (c)? Section 135 does not provide an answer on this, but one may say the title of the purchaser would be impeachable if he had notice of impropriety before the sale.

This is implied from the fact that section 135 (1) (a) excludes the mortgagee purchasing from the category of persons afforded protection. The reason behind the exclusion may arise from the fact or presumption that the mortgagee would be aware of intrinsic information about the property which may not necessarily be available to the ordinary purchaser. The knowledge factor is central. In like manner, an ordinary purchaser with

⁷⁷ At p. 318.

notice (actual or constructive) or knowledge of impropriety of sale should not be allowed to benefit from the protections under section 135 of the Land Act, 1999. As a result, the mortgagor may have to make sure potential purchasers are made aware of circumstances regarding the property to be sold. I will stress at this stage that I am of the view that section 135 (3) is limited to a situation where the purchaser acquires knowledge of impropriety between the time where the contract for sale has been entered and completion and not before.

At common law there is a different protection for a purchaser when the mortgagee exercises the express or statutory power of sale. For a statutory power of sale, the provisions of the Law of Property Act, 1925 apply. Generally a purchaser is not concerned to inquire whether the power of sale is properly exercised. But there may be circumstances where a purchaser obtains actual notice of impropriety of the sale without inquiry or is deemed to have constructive notice of the impropriety from those circumstances of which he has knowledge.⁷⁸ In these cases the conveyance may be set aside.

The course of action available to the person prejudiced by an unauthorized, improper or irregular exercise of the power of sale is to proceed for damages against the person exercising that power.⁷⁹ The relief available to the mortgagor is discussed in part 8.11 below.

⁷⁸ F & L p. 387.

⁷⁹ s. 135 (4) of the Land Act, 1999.

8.8 Proceeds of sale

As we have seen, the power of sale is given to the mortgagee to enable him to effectively realize his security. As a result, his interest in the sale takes precedence. However, the mortgagor is equally interested in the proceeds of sale. The mortgagor remains personally liable for the payments in case of a shortfall, but, on the other hand, he may ultimately be entitled to the surplus money if any. Normally the mortgagee could credit the proceeds of the sale to the payment of the principal and interest owed. If the sale yields a surplus over the amount owed under the mortgage, the surplus is paid to the person entitled whether it be the mortgagor or subsequent mortgagees.

The Land Act, 1999 provides an order of application of the proceeds of sale. Section 137 provides that the purchase money received by a mortgagee who has exercised his power of sale shall be applied in the following order of priority -

- (a) first, in payment of any rates, rents, taxes, charges or other sums owing and required to be paid on the mortgaged land;
- (b) second, in discharge of any prior mortgage or other encumbrance subject to which the sale was made;⁸⁰
- (c) third, in payment of all costs and reasonable expenses properly incurred and incidental to the sale or any attempted sale;

⁸⁰ The mortgagee needs to discharge prior mortgage or encumbrance subject to which the sale is not made.

(d) fourth, in discharge of the sum advanced under the mortgage or so much of it as remains outstanding, interest, costs and all other moneys due under the mortgage, including any money advanced to a receiver in respect of the mortgaged land under section 128;

(e) fifth, in payment of any subsequent mortgages in order of their priority, and the residue if any, of the money so received shall be paid to the person who, immediately before the sale, was entitled to discharge the mortgage.

The order under which the proceeds of sale have to be applied is of importance. The payment of rents and taxes would make sure that the property remains a going concern. Then the money has to be applied in discharge of prior mortgages or encumbrances subject to which the sale was not made.⁸¹ This requirement safeguards the interests of prior mortgagees made vulnerable by the provision of section 134 (4) of the Land Act, 1999.⁸² After paying all the costs of realisation and other expenses,⁸³ the mortgagee could use the remaining money to pay off the money due under the mortgage and credit the remaining money to subsequent mortgages. The residue of the proceeds of sale if any, should be paid to the person who, immediately before the sale was entitled to the mortgaged property.⁸⁴

⁸¹ This seems to be the intended meaning of paragraph (b) of section 137. Discharge of the sum subject to which the sale is made is provided under paragraph (d) of section 137.

⁸² See part 8.10 below on the effect of sale of the mortgaged land.

⁸³ See *McHugh v Union Bank of Canada* [1913] AC 299 at 312.

⁸⁴ The expression used under section 137 is that "... the residue, if any, of the money so received shall be paid to *the person* who, immediately before the sale, was entitled to *discharge the mortgage*". This may bring confusion because it is the mortgagee who discharges the mortgage and no one else. The mortgagor is only entitled to the discharged mortgage. In its sense paragraph (e) conveys an impression that the residue of the money should be paid to the mortgagee which is not the case.

Where the mortgagee is not sure where to credit the residue or where he cannot find the person entitled to the residue, he can pay the money into court.

8.9 Some instances of sale

There are some instances of sale which requires a close examination. Firstly, is sale of a matrimonial home, and secondly, is sale of customary mortgages. The two instances are unique because of the amount of controversy they have generated over time because of the sensitivity and emotional attachment associated with properties under which these mortgages are executed.

8.9.1 Sale of matrimonial home

As discussed in Chapter Five, part 5.4, mortgages of land can be created by using matrimonial homes. Significantly, the law imposes conditions when creating such mortgages. To be valid, the law requires that the signature of the mortgagor and spouse or spouses of the mortgagor living in that matrimonial home be obtained to signify their consent to the use of the home as a security. Alternatively, it requires evidence be furnished to show that the mortgagor and spouse or spouses living in the home consented to the use of the home as security.⁸⁵

Where a mortgaged matrimonial home becomes liable to be sold, that sale presents two main problems. Firstly, there is a tendency of spouses especially wives to object to the

⁸⁵ See s. 114 (1) (a) and (b) of the Land Act, 1999. See also Land (Mortgage) Regulations, 2005.

sale by challenging the validity of the mortgage claiming that they did not consent to the mortgaging of the home. This has become a norm. During field research, I was informed by bankers that, once they start to take steps to sell a mortgaged matrimonial home, a wife will certainly challenge such a sale and they feel the courts are too lenient on this.⁸⁶ Secondly, there was uncertainty concerning the attachability of a residential home in execution of a court's judgment. This feeling leads to an assumption that a matrimonial home cannot be attached to execute a court judgment. In the following parts, we will address these two issues.

8.9.1.1 Spouse's consent to the use of a home as a security

Traditionally, most matrimonial homes are in husbands' names. This poses a difficulty in ascertaining the existence of a spouse or spouses and their subsequent consent. Moreover, it is especially difficult in the case of polygamous marriages which are not uncommon in Tanzania to ascertain whether all wives have consented to the use of the home as security. It is common for the husband to use the home as a security for a loan obtained from the bank and once the home is liable to be sold, for the wife to go to court (whether in collusion with her husband or not) claiming to be unaware of the transaction and that her consent was never obtained when the mortgage was created.⁸⁷ The provisions which

⁸⁶ I learned this during my discussion with officials of NBC and Tanzania Investment Bank.

⁸⁷ See *Mtumwa Rashid v Abdalla Iddi and Salum Omari*, Court of Appeal of Tanzania, Civil Appeal No 22 of 1993 (unreported); *NBC Holding Corporation v Agnes Masumbuko, Msumi Metal & Wood Works Ltd, Njiwe Kavishe*, Court of Appeal of Tanzania at Arusha, Civil Appeal No. 51 of 2000 (unreported); *Idda Mwakalindile v NBC Holding Corporation and Sam Saijen Mwakalindile*, Court of Appeal of Tanzania at Mbeya, Civil Appeal No. 59 of 2000 (unreported); *Tanzania Investment Bank and Eric Auction Mart v M/S Ilabila Industries Ltd, John Momose Cheyo and Mrs Elizabeth Ngeleja Cheyo*, High Court of Tanzania (Commercial Division) at Dar es salaam, Commercial Case No. 27 of 2002 (unreported) ruling per Bwana J.; *Consolidated Holding Corporation v Abdallah Mpokonya, Marshal Ceramic Wares Enterprises*, High

were normally relied on to dispense with the requirement of a spouse or spouses' consent are section 60 of the Law of Marriage Act, 1971. It states:

Where during the subsistence of marriage, any property is acquired –

(a) in the name of the husband or the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse;

(b) in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal.

Furthermore, section 58 states:

Subject to the provisions of section 59 and to any agreement to the contrary that the parties may make, a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring, holding and disposing of any property.

Both sections 60 and 58 refer to matrimonial property which is general as opposed to the matrimonial home. However, section 59 is more specific. It states:

(1) Where any estate or interest in the matrimonial home is owned by the husband or by the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or

Court of Tanzania (Commercial Division) at Dar es salaam, Commercial Case No. 104 of 2004 (unreported) etc.

otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.

(2) Where any person alienates his or her estate or interest in the matrimonial home in contravention of subsection (1), the estate or interest so transferred or created shall be subject to the right of the spouse to continue to reside in the matrimonial home until –

(a) the marriage is dissolved; or

(b) the court on a decree for separation or an order for maintenance otherwise orders,

unless the person acquiring the estate or interest can satisfy the court that he had no notice of the interest of the other spouse and could not by exercise of reasonable diligence have become aware of it.

The above provisions particularly subsection (1) of section 59 are relied upon regularly by wives who find themselves in the predicament of losing the homes to bankers in satisfaction of loans advanced. It is clear from the subsection (1) of section 59 that the interest of the wife where the property is registered in the name of the husband is capable of being protected by caveat or caution and must indeed be protected. It has been

established that unless the wife registers a caveat with the Registrar of Titles, her interest would be defeated as there is no way the banks would know of her existence.

In *Idda Mwakalindile v NBC Holding Corporation and Sam Saijen Mwakalindile*,⁸⁸ the appellant alleged that through the media she became aware that the house which belonged to her and her husband (second respondent) was to be sold by the first respondent. The house which was registered in her husband's name was mortgaged by him to secure a loan from the first respondent. She alleged that she was not aware of the loan neither did she consent to the house being mortgaged. Referring to section 59 (1) of the Law of Marriage Act, 1971, it was held that:

“the appellant had a registrable interest in the house, which, as provided under this section, could be protected by a caveat. The appellant did not register a caveat with the Registrar of Titles. The caveat, would serve as a warning to the second [first] respondent that the house was a matrimonial property.... In the circumstance, there being no caveat to protect the registrable interest of the appellant, there was no way in which the first respondent could have known that the house was a matrimonial property”.⁸⁹

⁸⁸ Court of Appeal of Tanzania at Mbeya, Civil Appeal No. 59 of 2000 (unreported).

⁸⁹ At p. 4. Note there are erroneous transpositions in p. 4 (first paragraph). The sentence which reads ... the first respondent had no reason not to believe that the house belonged to the *first respondent*” as appear in the first paragraph should have been ... “the first respondent had no reason not to believe that the house belonged to the second respondent.” Similarly the sentence which reads “The caveat, would serve as a warning to the second respondent...” should have been “The caveat, would serve as a warning to the first respondent....” *Idda Mwakalindile case* was referred in *NBC Holding Corporation v Agnes Masumbuko, Msumi Metal & Wood Works Ltd, Njiwe Kavishe*, Civil Appeal No. 51 of 2000, CAT at Arusha (unreported) where the latter mistake was repeated.

Generally, section 59 (1) and (2) impacts on a sale of a matrimonial home registered in the name of a husband or a wife in two ways. First it impeaches a right of the lenders for vacant possession where such a lender had knowledge that the home was a matrimonial home yet did not take steps to obtain the consent of the other spouse. In such a situation, the spouse would be entitled to continue to reside in the home until the marriage is dissolved or there is separation. Secondly, it protect the rights to possession of a lender who did not seek consent but can prove that he had no notice (knowledge) of the interest of the other spouse and could not by exercise of reasonable diligence become aware of it.⁹⁰

The case of *Idda Mwakalindile* was handed in before the Land Act, 1999 and regulations thereto especially Land (Mortgage) Regulations, 2005 came into force. But is the decision in *Idda Mwakalindile* relevant today? It is not directly relevant as the Land Act, 1999 requires a spouse's consent for the mortgage of matrimonial home to be valid. It is provided that, for a mortgage of a matrimonial home to be valid, it must be shown that any document or form used in applying for such mortgage is signed by, or there is evidence from the document that it has been assented to by the mortgagor and the spouse or spouses of the mortgagor living in that matrimonial home.⁹¹ Alternatively, there must be furnished evidence to show that the mortgagor and the spouse or spouse consented to

⁹⁰ Two aspects, there is knowledge (notice) but no consent sought or no knowledge and therefore consent not sought.

⁹¹ s. 114 (1) (a) of the Land Act, 1999.

the mortgage.⁹² The law imposes a duty on the mortgagee to take reasonable steps to ascertain whether the applicant for the mortgage has a spouse or spouses.⁹³

It is difficult still for the banks to ascertain whether a home is a matrimonial home if the certificate of title is registered only in the name of a husband or a wife. The *Idda Mwakalindile* case insists on the need to register interests in the matrimonial home by way of caveat where the home is in the name of the husband alone. Failure to do so would make regulations under the Land (Mortgage) Regulations, 2005 stipulating steps to be taken to ascertain whether a home is a matrimonial home unachievable. Section 161 of the Land Act, 1999 states:

(3) Where a spouse who holds land or a dwelling house for a right of occupancy in his or her name alone undertakes a disposition of that land or dwelling house, then –

(a) where that disposition is a mortgage, the lender shall be under a duty to make inquiries of the borrower *has or the case may be*,⁹⁴ have consented to that mortgage in accordance with the provision of section 59 of the Law of Marriage Act, 1971.

The Land Act, 1999 regulates landed transactions in the country. Section 161 (3) makes section 59 of the Law of Marriage Act, 1971 and the decision in the *Idda Mwakalindile*

⁹² s. 114 (1) (b) of the Land Act, 1999.

⁹³ s. 114 (2) of the Land Act, 1999.

⁹⁴ There are words missing in paragraph (a) of subsection (3). I think the intended sentence would look like “...inquiries of the borrower *as to whether the spouse or spouses* have consented to that mortgage...” Note paragraph (b) for a guide.

case concerning registration of caveat relevant. The Land Act, 1999 and its regulations on the steps to be taken to discover the matrimonial status of the applicant have shortcomings. Simply asking the applicant to fill a form to state whether he or she is married or not will not achieve its goal. It can easily be abused. The inquiry will be nugatory as unless a caveat is entered in the register, there is no way banks would know or verify that the home is a matrimonial home.

8.9.1.2 Attachment of matrimonial home in execution of court's decree

The wording of section 48 of the Civil Procedure Code (CPC) has resulted in a discussion of the possibility of attaching residential homes in execution of a court's decree. Section 48 (1) of the CPC among others, mentions properties which cannot be attached in execution of a court's decree and paragraph (e) names a residential house occupied by the judgment debtor, his wife and dependent children for residential purposes. Section 48 reads:

(1) The following property is liable to attachment and sale in execution of a decree, namely lands, houses or other buildings ...”

Provided that the following shall not be liable to such attachment or sale, namely:-

(a) – (d)

(e) any residential house or building, or part of a house or building occupied by the judgment debtor, his wife and dependant children for residential purposes.

It followed from the above provision that as long as a residential house subject to attachment and sale is occupied by the judgment debtor, his wife and dependant children, it could not be attached and sold in execution of court a decree. But we have seen in part 8.4 above that the mortgagee does not need an order of the court (court decree) to sell mortgaged land. In that sense if the house is sold to enforce the mortgage without resort to the court, then section 48 is inapplicable. This view is supported by the decision of the Court of Appeal of Tanzania in the case between *National Bank of Commerce v Dar es Salaam Education and Office Stationery*.⁹⁵ In this case it was concluded that provided that the mortgagee sold the property in execution of the mortgage without resort to the court decree, the mortgagor could not invoke section 48 of the CPC.

Furthermore, in *Idda Mwakalindile v NBC Holding Corporation and Sam Saijen Mwakalindile*,⁹⁶ the Court of Appeal of Tanzania interpreted the reach of section 48 (1) (e). It was stressed that the provision does not apply to a sale enforcing mortgage. It was stated that “The section (that is section 48 (1)) applies to residential house in regard to attachment and sale in execution of a decree. In this case, the matter does not involve the execution of a decree, it concerns a mortgage”.⁹⁷

According to above quotations, it can be implied that if there is a court decree to execute, then the provision of section 48 apply. For this matter it may be prudent for lenders not to resort to the court as far as enforcement (sale) of matrimonial homes is concerned.

⁹⁵ [1995] TLR 272

⁹⁶ Court of Appeal of Tanzania at Mbeya, Civil Appeal No. 59 of 2000 (unreported).

⁹⁷ At p. 5.

8.9.2 Sale of land under customary mortgage

Until recently, customary mortgages were generally unknown in the main stream mortgages premises. It was limited to people practicing a certain customary law based on practices which were generally uncodified. As a result, the practice of customary mortgages still depends almost entirely on the established practices. After the enactment of the Land Act, 1999 and Village Land Act, 1999, the status of customary mortgages has been enhanced. The practice of customary mortgages is slowly being integrated into the main stream mortgages practices.

Customary mortgage is not a concern of this work. But the Land Act, 1999 creates the possibility of creating customary mortgages⁹⁸ and by doing so, it promote landed transactions under customary law. It also establish a system of title deeds for holder of customary rights of occupancy entitled a Certificate of Customary Right of Occupancy (Hati ya Ardhi ya Mila). This development would make land under customary right of occupancy more marketable. However, as was observed in the field research, bankers are wary of customary rights of occupancy and hence mortgages executed under customary law.

The Land Act provides a limited guide on the creation, administration and enforcement of customary mortgages. The Act does not purport to overhaul the management of customary mortgages. Despite the guide to the administration of customary mortgages provided in the Land Act, 1999, the Village Land Act, 1999 and the Land (Mortgage)

⁹⁸ See Chapter Five, part 5.3.4.

Regulations 2005, and the repeated mentioning of customary mortgages in the two acts, customary mortgages are still regulated by customary laws. The Land Act recognizes the diversity in customary law practices which would lead to different forms and manner of management. Section 115 (1) of the Land Act stipulates that the creation and operation of customary mortgages of land shall, subject to the provision of this section, continue to be in accordance with the customary law applicable to the land in respect of which the customary mortgage is created.

The Land Act contains provision which regulate dispositions of interests in land. The introductory provision under section 61 (1) assumes the role of the Land Act in regulation landed transaction in the country. It declares in part that no right of occupancy or mortgages shall be capable of being disposed of or dealt with except in accordance with the Land Act. However, subsection (2) of section 61 conditionally excludes application of the Land Act on a disposition of or dealing with land which was carried out or executed in accordance with customary law.⁹⁹ The exclusion is invalid where there is an express provision signifying that the Land Act applies in a particular matter.

The above exception in the application of customary law in the regulation, administration and adjudication of customary mortgages becomes necessary when there is a lacuna in customary law applicable to a particular mortgage transaction. The lacuna in customary law is possible as the practice of customary mortgages is still in the elementary stage but

⁹⁹ S. 61 (2) states “the provision of sections 61 to 166 of this Act, shall not, unless otherwise expressly declared to do so, apply to a disposition of or dealing with land carried out or executed in accordance with customary law”. Furthermore, subsection (3) states “for avoidance of doubt dispositions of customary rights of occupancy shall be governed by customary law”.

is evolving. In case of a lacuna in a customary law applying to a particular customary mortgage transaction, one has to first look at the other system of customary law for a provision or stipulation on the matter in question. If nothing is provided for in the other system of customary law, then the relevant provisions of part X of the Land Act apply.¹⁰⁰

One particular aspect of sale of mortgaged land under customary law is the limitations imposed on to whom the mortgaged land can be sold. The limitation stemmed from the possibility of interference by a third party in redeeming the land and the interests of the community in one's titles to land. We have seen in Chapter Five, part 5.3.4 above that in some customary law, the practice is that where a mortgaged land which is to be sold was held under rules of family tenure or was under clan control and that that land was mortgaged to a stranger without the consent of the family or clan as the case may be, any member of the family or that clan can redeem by repaying the mortgage debt. In that situation the redeemer of the land does not become the owner of the land, but will be entitled to recover from the owner the money he has paid plus compensation for improvements effected on the land while he was in possession.¹⁰¹ The mortgagor could get back his land from the clan member after paying the redemption price and compensation for the improvements effected in the land.¹⁰²

¹⁰⁰ See s. 115 (4) (a) and (b) of the Land Act, 1999.

¹⁰¹ See *Henrico s/o Welenggalle v Felecian s/o Karaama* (1968) H.C.D 347 in J & F pp. 411-413.

¹⁰² See *Melishoni bin Maimbi v Mzee bin Kombo*, App. to Governor No. 117, in J & F pp. 409- 410, it is the case in which the plaintiff successful claimed the land pledged to the defendants ancestors for over a hundred years ago (three generations). The plaintiff was ordered to pay the redemption price plus the value of improvements in the land. See also *Leonard Karomba v Mustafa Buberwa* (1968) H.C.D 131 in J & F pp. 410-411.

However, if clan or family land is mortgaged subject to the proviso that it becomes the property of the creditor if the loan is not repaid by a fixed date, a relative who redeems the land becomes the absolute owner.¹⁰³ The effect of the redemption by the clan or family member will extinguish the interest of the mortgagor in the land because a mortgage with such a stipulation is considered as invalid sale.¹⁰⁴ The practice underlines the overstated desire of customary law to protect land from alienation from a customary community.

The Land Act reiterates the limitation of the range of remedies which could be exercised by the mortgagee. It is a fact that the mortgagee could exercise a remedy under customary law which would have the effect of alienating the land from the mortgagor. However, the mortgagee needs to satisfy himself as to whether a particular remedy such as sale is exercisable in that customary community. Similarly an examination of the manner of sale and limitations if any as to whom the land can be sold to would be advantageous. This is because failure to ascertain the overall application of the remedy would impact on the power of the mortgagee to exercise the remedy. Section 115 (2) states that:

“Where the mortgagee under a customary mortgage seeks to exercise any customary remedy which involves or may involve the mortgagor being disposed or permanently deprived of the occupation of the mortgaged land, the mortgagee shall, after using the services of the Village Land Council, try and mediate on the

¹⁰³ See *Martin Bikonyoro v Celestin Kaokola* (1968) H.C.D. 87.

¹⁰⁴ See *Didas Rwakalila and 3 Others v Thomas Matondane* [1992] TLR 314 at 317 (CAT), see also the High Court decisions in *Thomas Matondane v Didas Mawakalile & 3 Others* [1989] TLR 210.

application of the proposed or any other remedy, make an order authorising the exercise of that remedy.”¹⁰⁵

Subsection (2) of section 115 provides for a situation where the mortgagee seeks to exercise a remedy which would dispose the mortgagor from the mortgaged land or permanently deprive him of the occupation of the land. The exercise of such remedies if applicable in a particular customary community is not absolute but subject to the censorship of the Village Land Council, in that the mortgagee needs to seek an order of the Village Land Council for its exercise.

The needs to protect land from alienation from a customary community and the limitations under section 115 of the Land Act on the range of remedies which can be exercised on customary mortgages make it unattractive to lenders. This fact was shared to me by bankers during my field research that for the reasons above they do not accept customary right of occupancy.¹⁰⁶ Once ascertained that a remedy such as a sale is exercisable in a particular customary mortgage, it is wasteful and bureaucratic to require an order of the Village Land Council for its exercise. The Village Land Council would have to try and mediate the matter first, an unrealistic path where money is overdue.¹⁰⁷ Even when sale is conducted, the possibility of an outsider to buy from a particular customary community may be slim. In most cases, prospective buyer has to come from within a customary community which limits a pool of potential buyer. The limitation imposed on the buyer of mortgaged land under customary right of occupancy has to

¹⁰⁵ One can be deprived either permanently or temporary of the occupation of the land, but certainly not disposed of the occupation of the mortgaged land. There is no such a thing as disposed of the occupation of the mortgaged land.

¹⁰⁶ Interview with officials of Tanzania Investment Bank and NBC.

¹⁰⁷ See Chapter Seven, part 7.4.

change. The need of the Village Land Council's sanction to sell customary mortgages will simply cause more delay, increase unattractiveness of customary rights of occupancy to lenders especially bankers and hence leave out a huge percentage of people holding land under customary law inaccessible to credit facilities from banks.

The mortgagor could also challenge the exercise of a particular remedy on a different ground. He may seek to re-open the mortgage on the ground that the terms of the mortgage are 115 (3) (a) unfair, (b) an unreasonable departure from the normal terms of a customary mortgage applicable in the area where the land is located, or (c) disadvantageous to the interests of his dependants.¹⁰⁸ In determining the matter, the Village Land Council shall be guided by sections 141 and 142 of the Land Act. As observed above subsections (2) and (3) of section 115 should not have been enacted because of the unnecessary limitations contained on the conduct of the customary mortgages.

While exercising his power of sale of the mortgaged land, the mortgagee is required to observe duties of the mortgagee selling the mortgaged land which applies to every form of mortgage.¹⁰⁹

¹⁰⁸ s. 115 (3) of the Land Act, 1999.

¹⁰⁹ See part 8.5 above.

8.10 Effect of sale

Sale of the mortgaged land may not be a straight forward affair especially when the mortgaged land is encumbered or where the mortgagor has dealt with the land substantially. In that situation, one would want to think about the rights and interests of the mortgagor after sale especially his right of redemption, the effect of the sale to the interests which burden the mortgaged land and the legal framework in place to facilitate this transaction. The examination of these issues might reveal some legal dilemmas. One would want to visit the history behind the exercise of the power of sale and conduct an overview of the applicable laws both at common law and in Tanzania to examine whether enough is provided to regulate this transaction.

Sale by its nature extinguishes the subject of the mortgage. It impacts on both the mortgagee and the mortgagor. Sale affects the mortgagor as it extinguishes his interests in the mortgaged land particularly his equity of redemption in the sense that he and his successor in title will not be able to redeem the land after sale. The mortgagee is also affected by sale as sale severs his interests in the property conferred on him by the mortgage. Likewise, sale would gradually affect other interests in the property depending on their priority.

After sale the mortgagee takes what is due to him and in case of a shortfall, the mortgagee may proceed against the mortgagor to enforce the personal covenant of payment.

At common law, a mortgagee exercising the power of sale conferred on him by the Law of Property Act, 1925 has power by deed to convey the property sold free from all estates, interests and rights to which the mortgage has priority, but subject to all estates, interest and rights which have priority to the mortgage.¹¹⁰ There is a long line of relevant authority clarifying this stance. In Tanzania, prior to the enactment of the Land Act, this position was provided for in the Land Registration Ordinance (Cap 334). The position was based on the requirement of registration of the title of purchaser (transferee) of the land. Section 51 (2) of Cap 334 provides that:

“Every such transfer, when registered, shall vest the mortgaged estate in the purchaser freed and discharged from all liability on account of such mortgage or any other incumbrance registered or entered subsequent thereto, except a lease to which the lender has consented in writing, or to which the consent of the lender is not required”.

In light of subsection (2) of section 51, the conveyance conveys the mortgaged land free from liabilities or incumbrances registered or entered subsequent to the mortgage. In other words, the purchaser would receive the estate freed from other interests in the property over which the mortgage had priority except a lease granted after the mortgage where the mortgagee had consented in writing of its creation or where the consent was not required. The Ordinance does not enunciate the position in respect of interests or estates which have priority to the mortgage. However, by logic of situation it could be implied that the interests which had priority to the mortgage could not be dissolved by the sale of the mortgaged land.

¹¹⁰ See s. 104 (1) of the Law of Property Act, 1925. See also F & L p. 400.

As to why Cap 334 merely mentions subsequent interests and silent on the previous interests is not clear. One may wonder whether it was an oversight or was regarded as unnecessary stipulation. Is it because of an assumption that prior mortgages normally have priority over subsequent mortgages as a result the mortgagor's interest would be subject to registrable interests in the land? Is it because the money obtained after sale has to be used in discharge of any prior mortgage or other encumbrance before the mortgagee can satisfy his debt?¹¹¹ A contrary position would be undesirable and dangerous. It is easy to imagine the negative consequences if a sale of the mortgaged land by the second mortgagee dissolving the first mortgage and other interests which have priority to the second mortgage.

One would have expected clarification from the Land Act, 1999 in regard to the position of the interests which have priority to the mortgage when the mortgaged land is sold. The Land Act under section 134 (4) simply repeats the position in Cap 334 without substantive change. It states:

(4) Upon registration of the right of occupancy or lease or other interest in land sold or transferred by the mortgagee, the interest of the mortgagor as described therein shall pass to and vest in the purchaser free from all liability on account of the mortgage, or on account of any other mortgage or encumbrance to which the mortgage has priority, other than a lease or easement to which the mortgagee had consented in writing”.

¹¹¹ See s. 137 (b) of the Land Act, 1999. See also part 8.8 above on the application of the proceeds of sale.

Again the Land Act is silent on the interests in the land which has priority to the mortgage. The observation that the land would not be freed from such interest would be in order. The shortcoming is slightly cured by the manner of application of the proceeds of sale which has to be applied first in discharge of prior encumbrances.

A sale of the mortgaged land is a disposition which would normally be subject to the prerequisite conditions in regard to disposition of interests in land. It is important to note that the Land Act, 1999 provides under section 132 (3) that “the exercise by a mortgagee of his power of sale shall not be a disposition which is subject to the provisions of section 38”. This provision replaces its predecessor that is section 131 (4) (original text) which stated a contrasting position that “the exercise by a lender of his [this] power of sale shall be a disposition which is subject to the provisions of section 38”.

Sale of the mortgaged land is a disposition, but it is in a category of disposition which does not require the approval of the Commissioner.¹¹² All that is required is a notice to be given to the Commissioner for Lands before or at the time of sale notifying him of the sale.¹¹³ However, section 38 grants the Commissioner supervisory powers over dispositions which, if exercised, could effectively halt the conveyance. Under section 38, he can issue a notice after receiving a notification of a disposition requiring that the conveyance should not proceed until they have sent to him or delivered to him additional information and documentation about the sale of the mortgaged land.¹¹⁴ Also, if the

¹¹² See regulation 4 (2) (b) of the Land (Disposition of Right of Occupancy) Regulations, 2001, GN No. 74 of 2001.

¹¹³ s. 36 of the Land Act, 1999.

¹¹⁴ See s. 38 (1) (a) of the Land Act, 1999.

Commissioner has a reasonable cause to believe that a disposition is about to take place or has taken place of which he has not received a notification under section 36 (3), he may require the parties to comply with section 36 and not to proceed with the disposition until they have delivered any additional information required by him.¹¹⁵

In addition, under section 38 the Commissioner if he has reasonable cause to believe that a disposition has been or is likely to be affected by fraud, or undue influence, or lack of good faith, or the fact that one party appears to have taken unfair advantage over another party to the disposition or that the disposition is not for value, he may apply to the Registrar of Titles to enter an injunction under section 79 of Cap 334 for rectification of the register where the disposition has taken place or prevent the disposition from taking place.¹¹⁶ Now, section 132 (3) simply exempts sale of mortgaged land from the above supervisory powers of the Commissioner for Lands.¹¹⁷ The exemption is important as it sidestep the unnecessary involvement of officials in business and therefore guarantees a quick conveyance.

8.11 Relief to the mortgagor

The availability of relief to the mortgagor whose land is to be sold or has been sold is important because of the possibility of the conflicts of facts leading to the sale or during sale. The mortgagor may therefore want to stop the sale from taking place or simply seek relief for injuries suffered from improper or irregular exercise of the power of sale. It is

¹¹⁵ s. 38 (2) of the Land Act, 1999.

¹¹⁶ s. 38 (3) of the Land Act, 1999.

¹¹⁷ See s. 38 of the Land Act, 1999.

therefore important to examine when the mortgagor can stop the sale, if he can stop it at all. In addition, an examination of remedies available to him after an improper or unauthorized exercise of the power of sale is important.

At common law, the power of the mortgagor to stop the mortgagee from selling the mortgaged land is essentially based on the propriety of the exercise of the power and the level of the exercise of the power. If the mortgagee is acting properly, he will not be restrained from exercising his power of sale because of a conflict on the amount due under the mortgage.¹¹⁸ The mortgagee could only be restrained from selling where before there is a contract to sell the mortgaged land the mortgagor tenders to the mortgagee or pays into court the amount claimed to be due that is, the principal, interest and costs.¹¹⁹ Once the contract is entered pending completion of the sale by conveyance (pending sale), it would be too late for the mortgagor to try to redeem.¹²⁰ The only exemption from the requirement of paying into court the amount claimed to be due is when on the face of the mortgage, the amount claimed seemed excessive.¹²¹ Short of that, if the mortgagee is acting properly, he may not be stopped from exercising his power of sale.

On the other hand, if the mortgagee has exercised his power improperly and the purchaser has knowledge of the facts, the purchaser can not obtain a right superior to the right of the mortgagor. The mortgagee and purchaser may both be restrained from completing the sale.

¹¹⁸ F & L p. 391.

¹¹⁹ There must be impropriety for the court to stop the sale, see *Waring Ltd v London and Manchester Association Co. Ltd* [1935] 1 Ch. 310.

¹²⁰ *Waring Ltd v London and Manchester Association Co. Ltd* [1935] 1 Ch. 310 at 318.

¹²¹ F & L p. 391. See *Hickson v Darlow* [1883] 23 Ch. 690.

If the mortgagee is acting bona fide, the presence of a case is insufficient to warrant restrain from the exercise of the power of sale. This was observed by Kalegeya J. in *M/S Ilabila Industries Ltd, John Momose Cheyo and Ngula Vitalis Cheyo v Tanzania Investment Bank and Eric Auction Mart*.¹²² Based on the established position of the law, the main reasons that the court can stop the sale from taking place is where the applicant manages to satisfy the court on the following. Firstly, that there exists a serious triable issue between the parties and secondly that there exists a likelihood of the matter being terminated in the applicant's favour. Thirdly, the applicant must establish that if the order sought (injunction) is not issued, the applicant will suffer irreparable loss that can not be compensated in monetary terms, and fourthly, that on a balance of convenience the applicant stands to suffer more if the prayer is refused than would the respondent if it was granted.¹²³

The Land Act, 1999 provides conditions precedent to the court's power to reopen certain mortgages or interfere with the mortgagee's power of sale. In most cases, conditions for the court's interference either in the form of an injunction or otherwise has to be a result of impropriety in the mortgage or the manner of the exercise of the power of sale. As a result, the mortgagor will not be required to pay into court before he can restrain the sale from taking place.

¹²² High Court of Tanzania (Commercial Division) at Dar es Salaam, Commercial Case No. 27 of 2002 (unreported).

¹²³ See *Edu Computers (T) Ltd v Tanzania Investment Bank*, High Court of Tanzania (Commercial Division) at Dar es salaam, Commercial Case No. 38 of 2004 (unreported), also *Attilio v Mbowe* [1969] HCD n. 284; *Ibrahim v Ngaiza* [1971] HCD n 249.

The mortgagor would want to impeach the form of mortgage, for instance where a mortgage of a matrimonial home is concerned alleging that the mortgage lacked the spouse's consent,¹²⁴ or is not registered, or was obtained through fraud, deceit or misrepresentation by the mortgagee or contains a provision which is unlawful. In such a situation, the mortgagor would be challenging the form of the mortgage or the validity of the mortgage.

Section 141 provides that (1) where a mortgage has been obtained – (a) through fraud, deceit or misrepresentation by the mortgagee; or (b) in a manner or containing a provision which is unlawful (whether by virtue of this Act or otherwise); or (c) as a result of the exercise upon the mortgagor of undue influence by a third party in circumstances where the mortgagee had notice thereof, application may be made by the mortgagor¹²⁵ for the exercise of powers contained in section 142. Under section 142, the court may do the following. The court if satisfied that the circumstances so justify, may declare the mortgage void,¹²⁶ or otherwise direct that the mortgage take effect subject to modifications ordered.¹²⁷

The mortgagor could also obtain relief after challenging the mortgagee's exercise of the power of sale. For instance, the mortgagor can challenge the exercise of the power of sale based on improper manner of entering into possession, such as where the properties are

¹²⁴ See s. 114 of the Land Act, 1999.

¹²⁵ Note under s. 141 (2) (b) if two or more persons are joint mortgagors, application may be made by one or more of them on their own behalf. But in case of an application made on the grounds set out in paragraph (c) of subsection (1) that is for a mortgage which has been obtained as a result of the exercise of undue influence by a third party in circumstances where the mortgagee had no notice, only the person alleging to have suffered from the undue influence may apply.

¹²⁶ s. 142 (1) (a) and (2) of the Land Act, 1999. See also s. 133 (6).

¹²⁷ s. 142 (1) (b) of the Land Act, 1999. See also subsection (3) and (4).

of the types listed under section 130 (5) and hence the mortgagee is in contravention of section 132 (2) of the Land Act, 1999, or, the exercise of the power of sale is in breach of duties imposed on the mortgagee selling,¹²⁸ or in breach of any condition precedent to the exercise of the power of sale.

As a result, the mortgagor may seek to stop the sale by injunction or seek any other remedies applicable in the matter. The mortgagor may not be challenging the validity of mortgage, but the manner of exercise of the power to sell the mortgaged land. He will have to rely on the relevant provision of the Civil Procedure Act, 1966.¹²⁹

As it was observed in the field research,¹³⁰ the exercise by the mortgagor of his power to stop the sale of the mortgaged land is one of biggest challenges faced by lenders in the exercise of the power of sale.¹³¹ The general feeling among lenders is that, the court is very lenient in granting injunctions. However, the exercise of this relief or power by the mortgagor would necessarily be done before the sale is complete because once the sale is completed, protection afforded to purchaser of the mortgaged land would mean the mortgagor may not be able to get back the land.

¹²⁸ See s. 133 (1) and (2) of the Land Act, 1999.

¹²⁹ See s. 140 of the Land Act, 1999.

¹³⁰ This is based on my personal observation during a field research in Tanzania which was conducted between March to April 2005.

¹³¹ See also observation by Mshana E. S., *Mortgage of a right of occupancy in Tanzania: The Mortgagee's remedy of sale of the mortgaged land*, University of Dar es salaam, 2002 (thesis), pp. 108 – 111.

However, before a contract to sell is entered into the mortgagor can pay to the mortgagee the sum due under the mortgage and be entitled to have the mortgage discharged.

Section 138 of the Land Act, 1999 states:

(1) At any time before an agreement is reached between the mortgagee and any purchaser for the sale to that purchaser of mortgaged land (whether or not such sale has been completed), the mortgagor or any other person who is entitled to discharge the mortgage may discharge the mortgage in whole or in part by paying to the mortgagee all moneys secured by the mortgage at the time of discharge”.

The provision, though ill drafted provides in effect that the mortgagor before a contract to sell is entered into can pay to the mortgagee and be entitled to have the mortgage discharged.¹³² The stipulation under the bracket “whether or not such sale has been completed” is contradictory and redundant. The mortgagor cannot get back the land after completion. The mortgagor cannot demand or cause the mortgage to be discharged after the sale is completed because after completion there won’t be a mortgage to discharge. He can only pay and be entitled to have the mortgage discharged before the sale is completed because after completion the title would have passed to the purchaser who is protected by the law.¹³³

As has been noted above, unlike at common law, where the purchaser is not protected if before completion of the sale he becomes aware of impropriety, in Tanzania under

¹³² In effect section 138 (1) provides simply that at any time before an agreement is reached between the mortgagee and any purchaser for the sale of the mortgaged land, the mortgagor or any other person who is entitled to the mortgaged land may cause the discharge of the mortgage in whole or in part by paying to the mortgagee the amount secured by the mortgage (due under the mortgage).

¹³³ See part 8.7 above on the protection of purchaser.

section 135 (3) the purchaser acquires good title even if at any time before the completion of the sale he becomes aware that the sale was improper or irregular.¹³⁴ Once sale is completed and the title is lawfully conveyed to the purchaser, the person prejudiced by irregular or improper exercise of the power of sale would merely have a remedy in damages against the person exercising that power.¹³⁵

¹³⁴ See part 8.7 above.

¹³⁵ s. 135 (4) of the Land Act, 1999.

CHAPTER NINE

CONCLUSION AND RECOMMENDATIONS

9.1 General observations

In this thesis, we have examined the law of mortgages in Tanzania following the enactment of the Land Act 1999. The study attempts to offer a critique of the statutory regime introduced by the Act, its weakness and achievement.

The thesis is divided in nine chapters. In chapter one, we have laid down the historical background behind the need to reforms the land law in the country. We have also given an account of the methodology we have used to conduct this research. Then we briefly examined the sources of land law and the role of each in chapter two. It can be noted that there are distinct bodies of laws which are applicable in the administration of land. Each plays some role either independently or in conjunction with another. However, the Land Act, 1999 provides the overall governance of transactions in land. In principle, no one can contract out of the Land Act, 1999 except for land which is held under a customary right of occupancy in which a relevant body of customary law applies.¹ An attempt to contract out of the Land Act, 1999 will make such a contract ineffectual to create, extinguish, vary or affect any right or interest in land, or in the right of occupancy, lease or mortgage. In this chapter, we have highlighted the historical role of the English law and its continual place in the judicial administration in the country.

¹ Customary law is applicable subject to the Land Act, 1999, other written laws and the Constitution.

In chapter three, an attempt was made to discuss the concept of security in land and land tenure in general. We have seen that there are different categories of securities in land. All forms of securities aim at protecting the creditors from borrowers once a borrower has failed to fulfill his contractual obligations. The understanding of the meaning of land, rights in land, estate or interest in land are important as ultimately this affects the bundle of rights and the interests which may be conveyed in a conveyance. In chapter three, the principle inherent in property law that no one can grant to another a greater estate than that he himself owns was emphasized.

In chapter four, we have basically highlighted the forms of mortgages which were capable of being created in the country before the enactment of the Land Act, 1999. This was important because the Land Act, 1999 amongst others things, continued the application of the law immediately before its commencement to any right, interest, title, power or obligation acquired, accrued, established before it.² In addition, it is provided that if steps were taken to create, transfer or execute a disposition before the Land Act, 1999 came into force, such a transaction, unless the contrary is specified, is to be regulated in accordance with the law applicable to it immediately prior to the commencement of the Land Act, 1999.³ This pronouncement made it important to revisit the position as it was before the Land Act, 1999. The same line of argument applies to transactions which were created before the 2004 amendment of the Land Act, 1999. Similarly, the discussion in chapter four would assist in shedding light on the changes brought about by the Land Act, 1999.

² s. 183 (1) of the Land Act, 1999.

³ s. 183 (2) of the Land Act, 1999. See also s. 183 (3).

In chapter five, we first provided an overview of the land law reforms in the country and then discussed the impact of the Land Act, 1999 on the law of property. As noted, the Land Act, 1999 created a more systematic forms of mortgages in the country. As such different forms of mortgages which are capable of being created under the Land Act, 1999 were discussed. Most of the forms of mortgages under the Land Act, 1999 were not entirely new when the Act came into force but were simply systematized by it. In the course of discussion, we have highlighted some of the salient features of the mortgage. For instance, the need of writing for a mortgage, the need to obtain the consent of the Commissioner before effecting a mortgage, registration of mortgages and other matters pertaining to mortgage transactions in general.

In chapter six, we have discussed the rights of parties under the mortgage and in chapters seven and eight we have examined the remedies available to the mortgagee upon default by the mortgagor.

As shown above, before the enactment of the Land Act, 1999, we did not have an Act to regulate and provide for the creation and enforcement of mortgages in the country. The then governing Act, mainly the Land (Law of Property and Conveyancing) Ordinance (Cap. 114) did not sufficiently enact for the administration of mortgages of land in the country. We therefore relied on the English laws. The English law was inaccessible to the majority of the people. The enactment of the Land Act, 1999 was important because for the first in the country we have a comprehensive domestic legal document which provides for overall administration in land matters.

The Land Act, 1999 and in particular the 2004 amendments are of ultimate importance in regard to the law of mortgages. The Land Act, 1999 was enacted to facilitate the smooth operation of the market while at the same time protecting the interest of the users of the land. This is a difficult balance. As a result the Act had used some stipulation such as percentage threshold device as a test for the observance or breach of duties of the mortgagee who sells the mortgaged land. Such a test is unrealistic and arbitrary. The Land Act, 1999 was also enacted and intended to be accessible not only to legal professionals but also the majority of Tanzanians. To achieve this aim, it employed simple language. But simplicity should not be at the expenses of clarity or certainty. The 2004 amendment to the Land Act, 1999 has corrected this latter difficulty.

As to the forms of mortgages, the Act has introduced different forms of mortgages or systematized a hitherto rugged premise. The provisions for the possibility of creating an informal mortgage or a mortgage referred to as lien by deposit of certificate of title is an important endorsement of existing, but rather uncertain forms of mortgages. It also provided certainty in this premises, by guaranteeing the availability of this facility to borrower and lenders alike the facilities which before the Act were not entirely the subject of the law of mortgages.

As originally enacted, the Land Act, 1999 seems to have leaned substantially against the interest of the lenders. It imposed more duties on lenders while framing mortgage deeds,

for instance by the conditions for the creation of small mortgages.⁴ The creation of small mortgages was excluded by the 2004 amendment of the Land Act, 1999. The Land Act as originally enacted also created almost impossible enforcement mechanism. It seems the Act then presumed that lenders were the dominant party in the mortgage transaction. This is not always the case. In a free market economy, as far as a party enters into a lawful transaction, in their free will and understanding the nature and implication of the transaction they have entered into, moral feelings should be irrelevant. The law should merely create a level and harmonious ground for the parties to tread on.

Mortgage practice is still in its infancy in the country in terms of volume and the understanding of the practice among the people. But as the practice grows and people become more familiar with it in its entirety, the presence of a suitable legal framework and institutions needed to facilitate mortgage transactions is important. As a result the 2004 amendments of the Land Act, 1999 are welcomed. It is true that the amendment came within a short period of time, that is less than four years after the Land Act, 1999 (original text) came into force, but they were necessary. The Land Act, 1999 as amended in 2004 creates a positive and equitable environment for the development of mortgage practice and the Tanzanian common land law.

⁴ See s. 114 (3) and (4) of the Land Act, 1999 (original text). See also regulation 6 of Land (Small Mortgages) Regulation 2001, GN No. 75 of 4/5/2001 now revoked by regulation 11 (a) of the Land (Mortgage) Regulations 2005.

9.2 Mortgage of matrimonial home

As discussed in chapter five above, it is possible to create mortgages by using a matrimonial home. The law imposes extensive conditions on the lender while creating mortgages of matrimonial home. We think it is proper that protection be afforded to spouses especially wives against dealing in matrimonial homes without their knowledge and consent.

This reflects reality because most of the problems associated with mortgages of matrimonial home come from the society. We still live in a society where husbands or men have more say in financial matters in the home and make most financial decisions for the family. As a result it is possible for a wife to find herself in a legal dispute against a bank or financial institution without her knowledge. However, these conditions and protection need to apply without distinction, that is, they should apply to both wives and husbands.

In addition, a lot of matrimonial homes are registered solely in the name of the husband as sole proprietor of the property. This may be a result of the fact that a wife may acquire an interest in the property later in life or just leaves the property management to the husband. This necessitates the need to protect a spouse (wife) against the possibility of losing the home through no fault of theirs. Basing on the circumstance of each case, the law needs to strike a balance, that is, to protect the vulnerable party in a dealing involving the matrimonial home without making the home unattractive to lenders.

The conditions imposed are applicable to all forms of mortgages such as ordinary mortgages or informal mortgages using matrimonial home. But in practice, it is almost impossible for the lender to know of the existence of the spouse especially when the name of the other spouse is not in the register or certificate of title. As long as wives interests in the homes remain unregistered, the problems of the use of matrimonial home as security will remain. In this case wives have got to register their interest in the matrimonial homes (property).

9.3 The question of approval for mortgage

As mortgage is concerned, the question of the requirement to obtain the consent of the Commissioner for Lands is provided for under section 41 of the Land Registration Ordinance (Cap. 334).⁵ This is because the Land Regulations 1960 which regulate dispositions in general exclude from their domain a wide range of mortgage transactions.⁶

As shown in chapter five above, failure to obtain consent or approval under section 41 of Cap. 334 means the mortgage will not be registered, and hence will be ineffectual to create, transfer, vary or extinguish any estate or interest in any registered land. The general requirement of approval to a disposition has been overhauled by the Land Act, 1999. What is needed is a notice to the Commissioner informing him of the disposition. However, mortgages of land still require the approval of the Commissioner for Lands

⁵ Section 41 (1) (a) of Cap 334 is amended by the Written Laws (Miscellaneous Amendment) Act, 1997.

⁶ See Chapter Five, part 5.6.2.

under the Act.⁷ This is a setback because approval may be refused⁸ and therefore the requirement of approval will always create uncertainty in mortgage negotiations.

The Land Act, 1999 was supposed to create an environment that would enhance the free market in land, but the requirement of approval is step back. It is not clear from the Land Act as to why the Act retains the requirement of consent to mortgage while a wide range of dispositions no longer require the consent of the Commissioner for instance sale of the mortgaged land which requires only notice. The only exception to the requirement of consent as far as mortgage is concerned involves mortgage by prescribed lender. The requirement of approval for mortgage should have been abolished all together because it slow and complicate the mortgage transactions. This fact was observed during field research. The need for approval does not serve any purpose but simply creates corruption as one has to negotiate through slow and usually incompetent government officials in essentially private arrangement.

Even the requirement to issue notice before, for instance sale of the mortgaged land, the question is, does notice work in practice or it is as good as consent or approval? How long does it take the Commissioner for Lands or authorized officer to endorse the notification and sends or delivers a copy to the Registrar under section 36 (4) is an issue that requires an investigation. This is because the Registrar is directed under section 36 (5) not to register any disposition which requires notification unless he is in receipt of a copy of notification endorsed by the Commissioner.

⁷ See Chapter Five, part 5.6.2.

⁸ s. 39 (5) (c) of the Land Act, 1999.

The effect is that the transaction which is notified but fails to get an endorsement or the endorsed notification of which does not reach the Registrar becomes inoperative as it will not be registered in the land register.⁹ Section 36 (1) (b) of the Land Act, 1999 which provides that the transaction shall be void if, among others, no notice was given will not apply.¹⁰ Section 36 (1) (b) applies only if no notice was given to the Commissioner for Lands. Again the requirement of notice is unnecessary and should never have been enacted. It serves no purpose. It simply creates a room for the involvement of government bureaucracy and hence slows business transactions.

9.4 Inconsistency in the use of expressions

There is inconsistency or confusion in the use of expressions or understanding of mortgage practices in general. Also in reading the Land Act, 1999 several obvious mistakes in expression can be observed. The mistakes undermine the significance of the Act.

1. The practice of discharging mortgage

As to the first issue, it seems the drafter never made up their minds on the practice of discharging a mortgage. It is rightly demonstrated in the Act that the occupier of the land may mortgage his interest in the land to secure the payment of money or performance of some other obligation. By mortgaging his interest in the land, the mortgagor is in effect burdening the land with obligation by charging it as a security. It follows that it is the

⁹ See s. 36 (5) of the Land Act, 1999.

¹⁰ s. 36 (1) provide that “a disposition of a right of occupancy shall - (b) be void if the provisions of this section and sections 37, 38, 39 and 40 are not complied with.”

mortgagee who discharges the mortgaged land after the payment of the money or performance of the conditions secured by the mortgage.

But the drafter was probably not sure which expression to use in regard to the practice of discharging the mortgage. The provisions of the Land Act, 1999 give an impression that both the mortgagor and the mortgagee can discharge the mortgage. This causes unnecessary confusion because it is the mortgagee who discharges the mortgaged land and never both. The discharge of a mortgage is an act which is equivalent not to redeeming but releasing. It is an act which releases the mortgaged land from the obligation under the mortgage. The thing which the mortgagor can do to obtain a discharge of the mortgage is to perform the condition upon which the mortgage is given. It would be absurd and unfounded to suggest and maintain that the mortgagor can actually discharge the mortgage. The mortgaged land subject of a mortgage is relieved of the mortgage's burden by the mortgage being discharged, which is done after the mortgagor has redeemed the mortgaged land.

In Part X of the Land Act, 1999 two sets of expression can be observed in regard to the discharge of a mortgage. The practice in regard to the discharge of a mortgage is regulated by section 121 (1) which stipulates clearly that upon the payment of the money owed or performance of the conditions secured by the mortgage, the mortgagee should at the request and cost of the mortgagor discharge the mortgage.¹¹ Furthermore, subsection (2) of the same section stating that any stipulation in the mortgage deed which requires that the mortgagor wishing to *obtain a discharge of the mortgage* will have to pay more

¹¹ See Chapter Six, part 6.7.

than what he is supposed to pay under the mortgage is void, rightly summarizes the practice of discharging the mortgage. This is complemented by section 131 (1) (e) and 131 (2) (e) of the Land Act, 1999.¹²

But the act of discharging a mortgage assumes a different practice under section 119 (1) and 138 (1) of the Land Act, 1999. In both sections it is assumed that the mortgagor may discharge the mortgage.¹³ This inconsistency in the practice may bring confusion and unnecessary disputes. For instance section 137 provides a guide on the manner of applying the proceeds of sale of the mortgaged land by the mortgagee. After stating the manner of application under paragraphs (a) to (e), it concludes by stating that “the residue, if any, of the money so received shall be paid to the person who, immediately before the sale, was entitled to discharge the mortgage”. At any particular time, it is the mortgagee who can discharge the mortgage and the mortgagor is entitled to a discharged mortgage. The confusion arises because it seems the intention of the drafter was to enable the mortgagor to appropriate the residue of the proceeds of sale if any. This stand reflects the established position of the law. However, this fact is not clearly provided for under section 137 because of the confusion in regard to the act of discharging the mortgage. If one has to maintain that it is only the mortgagee who can discharge the mortgage, section 137 would mean he will have to appropriate the residue of the proceeds of sale. But as already observed that is not the intention of the legislature. The inconsistency under section 137 could be cured by correcting the proviso to read:

¹² See Chapter Seven, part 7.7.1.

¹³ See Chapter Eight, part 8.11 on the discussion of section 138 of the Land Act, 1999.

s. 137 The purchase money received by a mortgagee who has exercised his power of sale shall be applied in the following order of priority –

(a) – (e)

and the residue, if any, of the money so received shall be paid to the person who, immediately before the sale, was entitled to *discharged* mortgage.

2. Obvious mistakes in the provisions

There are also mistakes in the provision which distort the intended meaning of the provisions. For instance section 115 (2) of the Land Act, 1999 is on customary mortgages and remedies which can be exercised under customary law. The provision refers to a remedy “which involves or may involve the mortgagor being disposed or permanently deprived of the occupation of the mortgaged land”.¹⁴ The provision is problematic. Indeed the customary mortgagor runs the risk (as is the case with other mortgages) of being temporarily or permanently deprived of the occupation of the mortgaged land, but there is no such a thing as *being disposed of the mortgaged land* or for that matter *being disposed of the occupation of the mortgaged land*. The same expression was used in section 113 (2) of the Land Act, 1999 (original text). The customary mortgagor can temporary or permanently be dispossessed of the mortgaged land.¹⁵ The offending word under section 115 (2) that is “disposed” should be deleted leaving an expression “...which involves or may involve the mortgagor being permanently deprived of the

¹⁴ See Chapter Eight, part 8.9.2.

¹⁵ “... the mortgagor being dispossessed of the mortgaged land or permanently deprived of the occupation of the mortgaged land...”.

occupation of the mortgaged land ...” Also note section 161 (3) (a) of the Land Act, 1999.¹⁶

3. Problem of expressions

There are also several issues in regard to the proper use of expressions. For instance section 118 (2) (b) mentions “subsequent mortgagor” while in fact it should be “subsequent mortgagee”, or section 137 (b) referring to “subject to which the sale was made” while in fact it should “subject to which the sale was not made”.¹⁷ These are small but vital mistakes which undermine the importance of the Act.

These deficiencies may not affect the practice substantially in so as the courts intervene and give the intended meaning to these provisions. The courts will have to read words into the text to give meaning to the provisions of the Act.¹⁸

The discussion of mortgages was founded on the assumption that a mortgagor owns the mortgaged property and he is using it as a security for a bank advance. We have fallen short of discussing mortgages as a means of acquiring property as is the case in countries such as UK or USA where mortgage is a primary means of financing home ownership in which prospective homeowners raise a substantial part of the required purchase price by to set roots in Tanzania. But overtime, with economic development and its impact on the demand for more property coupled with the increase of public awareness will result into the introduction of new mortgage practices.

¹⁶ See Chapter Eight, part 8.9.1.1.

¹⁷ See Chapter Eight, part 8.8.

¹⁸ See *Stephen Wasira v Joseph Warioba* (1997) TLR 205 (CA).

As it stands, the Land Act, 1999 is important piece of legislation. With few changes and correction as shown throughout this work plus the purposeful intervention by the courts to give provisions their intended meaning, the Act will achieve its goals of creating a harmonious business environment in the country. Inevitably, overtime the Act will have to be reviewed especially on security of tenure to allow absolute title in land so as to create more confidence in dealings in land. Also forms of land ownership will have to be reviewed to allow more people even foreigner to own property in the country and hence boost investment in the property market.

SURVEY OF THE STATE OF LENDING IN TANZANIA

George Mwaisondola
University of Birmingham, UK

Please answer all questions. Even if you do not know the precise information requested, please provide your best estimate. In any situation, feel free to proceed in a separate sheet.

Note that any information you provide will be kept strictly confidential.

General questions about your bank (optional)

1. What are the main services/ product your bank offers?

2. In what year was the bank incorporated? (Note if it was reconstructed/changed over time)

State of lending

1. Whether there is a huge demand for lending/borrowing.

2. Whether there is a rise or fall of demand over the past few years (5 years).

3. What are the lending policies/guidelines? (Proceed in a separate sheet if necessary)

Securities

1. As for securities, what are the main (popular) forms of securities acceptable by your bank? (Mention in the order of importance)

2. On mortgages, what is the most popular form of mortgage executed by borrowers?

3. What are the other forms of mortgages offered? (Mention in the order of importance)

4. The Tanzania Bankers Association (TBA) pressed for the inclusion of the third party mortgages in the recent amendment to the Land Act, 1999 [Land (Amendment) Act, 2004]. In your experience, why third party mortgages?

5. In connection to that, was it not possible to create a third party mortgage without amending the Land Act, 1999?

6. What are the main problems you face concerning security of mortgage of land?

7. There is a belief that lenders pollute the lending-borrowing premises that in your quest for profit you end up creating transactions which not sanctioned by law. What is your opinion on that?

8. Comments on the laws.

9. Do you have any comment/opinion on the role of the courts in facilitating lending and loans recovery?

Mortgage (security) enforcement

1. What factor(s) influence your choice of a remedy? In other words, what makes you decide to either sale the mortgaged land or appoint a receiver or enter into possession? (Proceed in a separate sheet if necessary)

2. Considering administration costs of a remedy e.g. sale, appointment of a receiver, which remedy can be considered to be cheaper and/or convenient? (Why)

3. In a case where the mortgagor has just one property (immovable) which is mortgaged to you. Upon default by such a mortgagor, what do you do if you realize insufficient money after sale realizing it?

4. Have you ever proceeded against a defaulting borrower (foreign) who mortgaged his land which was acquired through Tanzania Investment Centre?

5. If yes, how did you proceed in that situation?

Thank you for taking the time to answer these questions.

Address: [deleted]

Email: [deleted]

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